

Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws To Make Handguns and Other Consumer Goods Safer

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This Article critiques the current product safety regime in the United States and identifies a means for its immediate improvement. Under the present system, consumers are guarded against defective products by a two-tiered safety net, comprised of federal regulatory authority and state-based tort law. However, both tiers of this safety net are flawed, and when these flaws overlap, consumers are exposed to serious dangers from defective products. Millions of consumer goods each year fall through these “holes” in the safety net, with poorly designed handguns being perhaps the best known example.

Traditional remedies for these flaws—such as remedial federal legislation, municipal legal action, voluntary standards, and increased disclosures of information—are ineffective patches for the safety net. However, the recent confluence of developments in administrative law and state unfair trade practices law can provide the solution to this problem. This Article proposes that these developments allow state attorneys general to promulgate regulations setting product standards for goods that fall through the current product safety net. The attorneys general can set these standards immediately, without further legislative authorization, and thus prevent the harm and injury that stems from the sale of such defective consumer goods.

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Patching the Holes in the Consumer Product Safety Net

Introduction

Most Americans rest easy under the incorrect assumption that the products they use are all subject to vigorous federal scrutiny. They presume that every item, from lawn mowers to cooking implements and baby toys, is poked, prodded, and tested by one of the numerous federal agencies that were created to protect the public.

In fact, the actual product safety picture in the United States is quite different. While several federal agencies have jurisdiction to oversee a variety of consumer products, they actually regulate comparatively few. For instance, although over 10,000 consumer products are within the purview of the federal Consumer Product Safety Commission (CPSC), the agency has issued only fifteen sets of regulations under the Consumer Product Safety Act in over 30 years.¹ Actual regulation plays a minor role in the protection of American consumers.

Most products are not covered by existing regulations, but by an honor system. This system is not based just on the goodwill of the product manufacturers. It assures compliance by confronting manufacturers with a two-pronged threat. The first prong is the possibility that the federal agencies may begin to regulate, and thus restrict, a consumer product should it establish a bad track record.² The second prong is the possibility of crushing tort liability from private suits if products are not made "reasonably" well. Together, the dual threats of federal regulation (sometimes executed) and product liability suits have contributed to better and safer goods for consumers over time.³

Thus, the federal regulatory power (both existing regulations and the spectre of future regulation) and the backdrop of tort liability form a two-

1 See 16 C.F.R. §§ 1201-1211, 1301-1306 (1999). These product safety regulations govern, respectively, architectural glazing materials, matchbooks, bicycle helmets, citizens band radio antennae, swimming pool slides, cellulose insulation, cigarette lighters, garage door openers, refuse bins, extremely flammable contact adhesives, lead paint, consumer patching compounds containing asbestos, ash and ember containing asbestos, and lawn darts. The CPSC also has promulgated regulations as directed by other statutes, including the Federal Hazardous Substances Act. See 16 C.F.R. § 1500 (1999) (regulating hazardous substances and establishing safety rules for children's toys).

2 In fact, the CPSC has a nationwide surveillance system set up to monitor the products under its jurisdiction. Via its NEISS network, the CPSC obtains information regarding a statistical sample of consumer product injuries in the United States and, thus, can determine how best to direct the agency's limited resources. See generally U.S. CONSUMER PROD. SAFETY COMM'N, NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM, SAMPLE DESIGN AND IMPLEMENTATION (1994); see also Joseph L. Annett et al., *National Estimates of Nonfatal Firearm Related Injuries*, 273 JAMA 1749 (1995). Similarly, the CPSC also relies on reviews of consumer complaints and other sources of information to scrutinize developments in the consumer product market. See 15 U.S.C. § 2054(a)(1) (1994) (requiring the CPSC to maintain an injury information clearinghouse concerning injuries and deaths caused by consumer products); 16 C.F.R. § 1115 (1999) (regulating information gathering and maintenance).

3 See *The New, Improved CPSC*, TRIAL, Sept. 1994, at 22; *Playing It Safe*, TRIAL, Oct. 1998, at 20.

tiered safety net for consumer product safety in the United States. Although the system has worked reasonably well for many products, it is not without flaws. In addition to the limited number of actual, rather than potential, product regulations, the first tier of the safety net includes explicit exemptions that bar federal agencies from even considering regulating certain products.⁴ The tort system's effectiveness in promoting product safety also has limits. It provides less than optimal incentives to manufacturers regarding product safety design, and for certain types of products, it provides no real deterrence against the design and production of defective goods.⁵ When these flaws in the two tiers of the safety net align, consumers are left essentially unprotected.

Given the array of products in the American marketplace, this is by no means a rare occurrence; millions of goods are sold each year that fall through the product safety net. Firearms provide perhaps the most recognizable examples.⁶ Far too often, firearm manufacturers decline to make even basic safety modifications and improvements to their goods, because they are exempted from federal consumer product regulation by statute⁷ and tort recoveries historically have eluded most plaintiffs in handgun tort suits. Although manufacturer Iver Johnson stated in 1894 that any gun that discharges without the pull of the trigger "is a mechanical absurdity as well as a constant danger,"⁸ each year hundreds of injuries result from that precise flaw.⁹ Similarly, although federal studies show that simple childproofing devices could eliminate common handgun injuries to young children,¹⁰ manufacturers often do not employ such devices.¹¹ This remains true more than one hundred years after Smith and Wesson invented a childproof handgun.¹² The current product safety net offers no meaningful protection from such basic safety risks; it cannot be expected to prevent future injuries from such defective products.

4 See, e.g., 15 U.S.C. § 2052(a)(1)(B)-(I) (1994) (exempting tobacco and tobacco products, motor vehicles, pesticides, firearms, aircraft, most boats, drugs, medical devices, cosmetics, and food from CPSC regulation).

5 See *infra* Part II.B.

6 See generally 70 AM. JUR. 2D § 42 & Supp (1996).

7 See 15 U.S.C. § 2052(a)(1)(E).

8 Erik Larson, *Wild West Legacy: Ruger Gun Often Fires if Dropped, but Firm Sees No Need for Recall*, WALL ST. J., June 24, 1993, at A1 (quoting Iver Johnson).

9 See *id.*

10 See U.S. GEN. ACCOUNTING OFFICE, ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 2-3 (1991).

11 See *id.* at 33-35; see also Jon S. Vernick et al., 'I Didn't Know the Gun Was Loaded: An Examination of Two Safety Devices That Can Reduce the Risk of Unintentional Firearm Injuries', 20 J. PUB. HEALTH POL'Y 427, 431-33 (1990) (noting long-standing existence of important gun safety devices that are not widely utilized by many gun manufacturers).

12 See KRISTA D. ROBINSON ET AL., JOHNS HOPKINS UNIV. CTR FOR GUN POLICY AND RESEARCH, PERSONALIZED GUNS: REDUCING GUN DEATH THROUGH DESIGN CHANGES 5 (1995); Testimony of Stephen Teret, Public Hearing on Massachusetts Handgun Sales Regulation 4 (Nov. 26, 1996).

Patching the Holes in the Consumer Product Safety Net

This Article proposes a way to patch the holes in the existing product safety net without new federal or state legislation and without altering the tort system. Taken together, recent developments in state "unfair trade practices" jurisprudence should permit state attorneys general,¹³ in their respective jurisdictions, to establish product safety standards for goods that fall through the existing safety net,¹⁴ including defective handguns.

The Article first reviews the existing product safety framework, noting the shortcomings of that two-tiered system. It then discusses possible alternatives to improve the current system, pointing out the difficulties with each. The Article next analyzes how unfair trade law can be used to regulate product safety, and how this solution provides an existing, simple, and readily available tool to patch the product safety net. Finally, the Article will consider potential criticisms of this new legal device and address public policy considerations as to whether the attorneys general should use it to make products safer.

I. The Existing System

The current product safety system in the United States can most simply be viewed as divided between government oversight and private corrective action. The large majority of products are subject to the oversight of one or more federal administrative agencies, whose standards and regulatory precepts set a floor for product safety.¹⁵ To a large extent, state regulation is absent from these areas due to the preemptive effect of federal regulations under these legislative schemes¹⁶ and the basic, though unpleasant, fact that state legislatures are often not well equipped to address the detailed specific issues of product safety.¹⁷ Thus, specific

13 The term "attorney general" is used generally here, although in some states the implementation of unfair trade practices law (known as "Unfair or Deceptive Acts and Practices law," or "UDAP law") is delegated in whole or in part to a different state agency, such as a Commissioner of Consumer Affairs. *See, e.g.*, HAW. REV. STAT. § 480 (1999); MONT. CODE ANN. §§ 30-14-101 to 30-14-143 (West 1995); UTAH CODE ANN. § 13-2-1 (West 1995).

14 *See infra* Part III.

15 The CPSC regulates the safety of "consumer products." 15 U.S.C. § 2051-2052 (1994) (establishing the CPSC and broadly defining consumer products). Other federal agencies regulate safety of specific products within their expertise. *See* 49 U.S.C. §§ 30101-30111 (1994) (authorizing the Department of Transportation to regulate motor vehicle safety); 49 U.S.C. §§ 40101, 44701 (1994) (authorizing the Federal Aviation Authority to regulate safety of aircraft); 21 U.S.C. §§ 301 (1994) (authorizing the Food and Drug Administration to regulate safety of food, drugs, medical devices, and cosmetics).

16 *See, e.g.*, 15 U.S.C. § 2075(a) (1994) (stating that CPSC regulations establishing safety standards preempt state standards).

17 This is reflected in the findings that supported the enactment of the Consumer Product Safety Act: "control by state and local governments of unreasonable risks of injury associated with consumer products is inadequate." 15 U.S.C. § 2051(a)(4) (1994). Indeed, state efforts, even when undertaken, have tended to aim haphazardly "at specific hazards or narrow categories of products," and rarely allocate the needed support to see these efforts through. WILLIAM KIMBLE, FEDERAL CONSUMER PRODUCT SAFETY ACT 43-47 (1975).

product safety standards tend to be driven largely by the actions of federal agencies.

Complementing this federal role is a tort system based largely in state law, through which injured consumers may bring private suits against makers or sellers of defective products. Because of the possibility of substantial damage awards, manufacturers usually take into account tort liability when designing products and take precautions against releasing defective goods into the stream of commerce.¹⁸

This Part provides a brief overview of the two tiers that compose the safety net and the substantial benefits each brings to consumers. It then focuses particularly on the flaws in the safety net, where the existing system fails to provide consumers with the necessary reliable protection.

A. *Federal Regulatory Powers in Consumer Safety*

During the 1970s, the United States Congress began an initiative to concentrate the product regulatory powers that were nascent and dispersed throughout the federal government into a single, quasi-independent agency. Using the increasingly refined approach of administrative rulemaking¹⁹ as well as other more traditional enforcement vehicles, this agency was given the task of overseeing the safety of over 10,000 consumer products commonly used by American consumers.²⁰ Although a variety of specialized consumer products remained within the purview of other federal agencies,²¹ most products purchased by consumers were subject to review by the new CPSC.

Consumer protection was not a new issue for the federal government. A litany of federal statutes had established specific standards for certain goods, and others had directed agencies to create safety standards for specific product lines, such as refrigerators and flammable fabrics.²² Moreover, federal agencies with broad consumer protection mandates, most notably the Federal Trade Commission (FTC), had at times addressed the sale of unsafe products with whatever procedural tools were at their

18 Cf. 63 AM. JUR. 2D § 1 (1996) ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards of life and limb inherent in defective products that reach the market.").

19 See, e.g., *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973); see also *National Petroleum Refineries Assoc. v. Fed. Trade Comm'n*, 482 F.2d 672 (D.C. Cir. 1973); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 487 U.S. 837 (1984).

20 See 15 U.S.C. §§ 2051-2052 (1988). Section 2052(a)(1) defines "consumer product" as: any article, or component thereof, produced or distributed i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise

15 U.S.C. § 2052(a)(1).

21 See *supra* notes 4, 15.

22 See, e.g., 15 U.S.C. §§ 1211-1214 (1994); *id.* §§ 1191-1204.

disposal.²³

Congress, however, decided to centralize these activities and to promote product safety through prospective rulemaking, rather than piecemeal legislation or post hoc adjudication. Many legislators hoped that this new agency, the CPSC, would rigorously review consumer products, take the time to gather all necessary information, and use its developing expertise to set appropriate safety standards.²⁴

Most observers agree that the experiment was a success.²⁵ Since the enactment of the Consumer Product Safety Act and related statutes, the rates of injury from a wide variety of consumer products have greatly declined.²⁶ The agency itself commonly trumpets that its regulations have drastically reduced injuries by forcing manufacturers to make safer cribs, bicycles, cigarette lighters, fireworks, and drug packaging.²⁷ Moreover, the mere possibility that the CPSC might regulate a product provides some deterrence against poor design.²⁸ The CPSC's regulatory power allows it to obtain "voluntary" industry compliance with basic safety principles in many areas of manufacturing.²⁹ The CPSC is able to convince companies to modify and even recall hundreds of products each year to improve safety.³⁰ Further, the CPSC's "suggestions" to industry groups have in the past resulted in prompt alteration of industry standards to ameliorate informal CPSC concerns.³¹ Given the cost of recalls and post hoc product redesign, responsible companies are likely to consider potential CPSC action when preparing their products for market.

B. *The Tort Deterrence Backdrop*

The common law tort system, which allows private parties to bring

23 See, e.g., *In re Chemway Corp.*, 78 F.T.C. 1250 (1971) (stopping the sale of a toothbrush treated with dangerous chemicals by the FTC using its adjudicatory powers).

24 See SEN. REPORT NO. 92-835 reprinted in 1972 U.S.C.C.A.N. 4573; HOUSE CONF. REPORT NO. 92-1593, reprinted in 1972 U.S.C.C.A.N. 4597.

25 While its popularity with Congress, the President, and commentators has fluctuated, most would agree (though perhaps some only grudgingly) that the CPSC overall has improved consumer product safety. See, e.g., Robert S. Adler, *From Model Agency to Basket Case—Can the CPSC Be Redeemed?*, 41 ADMIN. L. REV. 61, 129 (1989).

26 See, e.g., *Playing it Safe*, *supra* note 3, at 20 (discussion of increased toy safety by CPSC Commissioner Anne Brown); U.S. CONSUMER PROD. SAFETY COMM'N, SAVING LIVES THROUGH SMART GOVERNMENT (1996) [hereinafter SMART GOVERNMENT]; U.S. CONSUMER PROD. SAFETY COMM'N, 1995 ANNUAL REPORT (1995).

27 See generally SMART GOVERNMENT, *supra* note 26.

28 See also *Playing It Safe*, *supra* note 3, at 20 ("[I]t's wonderful how a potential regulation stimulates an industry's creativity.").

29 See 15 U.S.C. § 2058(b) (1988) (promoting voluntary standards); 16 C.F.R. § 1031 (1999) (noting CPSC participation in and assistance in creating voluntary standards).

30 In 1994, the CPSC requested voluntary recalls for over 300 products. In every case, the companies complied. See SMART GOVERNMENT, *supra* note 26, at 11-12.

31 See *id.* at 6-11.

civil actions against the manufacturers or sellers of defective or unsafe goods, serves as a backdrop to federal regulation and an additional layer of protection against unsafe products. When constructing the federal regulatory regime, Congress took great pains not to disturb the tort remedies already available to consumers.³² Indeed, with few exceptions, federal law generally has left the state tort system in place. Tort law continues to serve the vital function of disciplining the market and ensuring that manufacturers pay close attention to safety issues, even when the relevant federal regulatory agencies are unfocused or unconcerned.³³

Product safety tort law, which developed initially as a common law state doctrine but has been altered to some degree by statute in many jurisdictions,³⁴ has developed along several different lines. Victims harmed by defective or unsafe products may recover their damages under a theory of negligent design (the manufacturer failed to take reasonable care in designing his product) or certain versions of strict liability (regardless of the care taken, the manufacturer sold a product that was unfit for the purpose for which it is generally used, and an adequate alternative design was practicable).³⁵ In instances where the manufacturer knows of the danger but proffers the goods for sale anyway, many jurisdictions provide for punitive damages.³⁶ When combined with the availability of class actions,³⁷ even minor product safety hazards can create substantial monetary risks for commercial sellers. As a general matter, the incentive to design a safe product could not be clearer. In combination with federal regulatory authority, tort law deterrence creates a life-saving safety net in the consumer product marketplace.

32 See 15 U.S.C. § 2074(a) (1988). As a practical matter, however, compliance with a CPSC safety regulation may insulate a defendant from a tort claim that would seek to impose conduct contrary to the CPSC regulation. See, e.g., *Moe v. MTD Prods., Inc.*, 73 F.3d 179 (8th Cir. 1995). However, this is relevant only for those few types of products subject to an existing CPSC regulation. Tort law applies to all other products. Moreover, tort suits also provide an additional level of protection when CPSC regulations are violated. See 15 U.S.C. §§ 2072-2073 (1988) (stipulating a private right of action for a knowing violation of a CPSC standard).

33 See, e.g., *Johnston v. Deere & Co.*, 967 F. Supp. 578, 580 (D. Me. 1997) ("Congress was concerned . . . that the creation of the CPSC and its new authority would not impede common law litigation in the states over unsafe products."); see also 15 U.S.C. § 2074(b) (1988) (ensuring that nonaction by federal agency does not interfere with state tort suit); KIMBLE, *supra* note 17, at 282-83 (stating that Congress intended CPSC safety standards to supplement state tort law product safety remedies, not to establish exclusive safety standards).

34 See 63 AM. JUR. 2d § 2 (1996).

35 See *id.* § 3.

36 See, e.g., *Loudermill v. Dow Chem. Co.*, 863 F.2d 566 (8th Cir. 1988); 63 AM. JUR. 2d § 1933, 1941 (1996).

37 Class actions may be appropriate for product safety claims where a common question predominates among all plaintiffs. See 63 AM. JUR. 2d § 1718. However, plaintiffs may find it difficult to certify a class in a product liability suit. See cases cited *infra* note 80.

C. *Holes in the Net*

As useful as the current product safety system is, both federal regulatory authority and the private tort adjudicatory framework are imperfect tools to protect consumers from dangerous products. While the flaws in each system could conceivably be counteracted and balanced by the strengths of the other (i.e., if one system does not work particularly well in a given instance, the other can still function to provide the needed protection), the “holes” in each level of the safety net sometimes overlap. Thus, for certain types of products, consumers are left with little actual protection and no real deterrence against the sale of unsafe goods.

1. Holes in the Federal Regulatory Protections

The most glaring defects in the federal regulatory system are the statutory exemptions from the CPSC’s authority. Written directly into the enabling laws, these exemptions specifically bar the CPSC from regulating a variety of consumer products.³⁸ All firearms, tobacco products, motor vehicle equipment, home pest devices, airplane-related appliances, cosmetics, and food items, as well as other goods that display specific types of hazards, are exempt from CPSC oversight. While many of these product types are regulated by other federal agencies,³⁹ such regulators lack the more generalized experience of the CPSC and may not have the practical ability to address all consumer safety issues (one of the original reasons for the creation of the CPSC).⁴⁰ Moreover, items such as firearms

38 See 15 U.S.C. § 2052(a)(1)(A)(I) (1994).

39 See *supra* note 15.

40 See Adler, *supra* note 25, at 64 (noting congressional awareness of the shortcomings of existing agencies prior to creation of the CPSC). While some scholars imply that agency specialization along industry lines should lead to higher quality oversight, practical difficulties may weigh against such an outcome. Industry-specific agencies may be more prone to agency capture. See, e.g., 126 CONG. REC. S5688 (1980) (noting that the generalist FTC “is th[e] watchdog . . . I only wish that other federal agencies, which so often become creatures of the industries they are supposed to regulate, felt as strongly about the people’s rights”). They also may be less likely to focus on consumer protection issues, neglecting such duties in order to focus on their main regulatory *raison d’être*. Cf., e.g., S. REP. NO. 93-280, at 14 (1973) (noting the Federal Reserve’s lack of enthusiasm for its ancillary consumer responsibilities, except when banking industry itself wants intervention); 126 CONG. REC. S1228 (1980) (noting Department of Health, Education and Welfare’s need of FTC assistance); 125 CONG. REC. H11,194 (1979) (noting poor enforcement of fair trade requirements by Department of Agriculture, and indicating that the FTC, as a general antitrust enforcer, is better equipped with respect to such issues). In addition, these agencies’ concentration on a single industry may leave them less cognizant of consumer use patterns that apply generally to consumer protection but may not have arisen previously in the context of the one specific class of products within the agency’s purview. See generally MODENA HOOVER WILSON ET AL., SAVING CHILDREN: A GUIDE TO INJURY PREVENTION (1991). For instance, CPSC experience with childproofing in various contexts would give it broader insight into the need for and viability of various childproofing devices in a given product than an agency dealing with such devices for the first time. See, e.g., SMART GOVERNMENT, *supra* note 26, at 9-10 (noting that the CPSC uses generally applicable child safety research and development to improve

are not regulated for product safety by any other federal agency.⁴¹ The exemption completely removes firearms from this tier of the consumer safety net.

Another practical flaw is the very few prospective standards for consumer products actually established by the CPSC. Over the course of thirty years, the CPSC has promulgated only fifteen sets of mandatory product design rules under the Consumer Product Safety Act, with most of these being issued in the agency's early years.⁴² Thus, there are few consumer products actually governed by regulatory design standards. Such administrative lethargy not only means that most products are not subject to specific regulatory standards but also risks eroding the deterring power of the regulatory apparatus.⁴³ Industry skepticism of the CPSC's will to act may be countered by a concomitant fear that the CPSC is simply satisfied with the status quo, and that the lack of regulations merely reflects general industry compliance with CPSC safety goals. However, such a fear can lessen over time, as the CPSC fails to obtain rigorous and universally applicable industry concessions on safety and yet still abjures new regulations.⁴⁴ Given the infrequency of regulatory action in this arena, manufacturers may begin to discount the possibility of future regulation and take their design responsibilities less seriously.⁴⁵

cribs and hair dryers); *id.* at 7-8 (same for children's clothing hazards). Moreover, a generalized consumer protection agency, well experienced in dealing with and anticipating unscrupulous business actions, may be in a better posture to analyze industry positions and arguments than an agency whose general success relies upon long term cooperation with a small set of industrial players.

41 Imported firearms are subject to some restrictions upon entry into the United States, and the Customs Department will seize nonconforming goods. However, the domestic market is completely unregulated by federal agencies regarding safety issues. The main federal agency with authority over firearms, the Bureau of Alcohol, Tobacco, and Firearms, is a subdivision of the Treasury Department, and spends its time enforcing licensing and taxation issues, which often manifest themselves in the criminal bootlegging or unlicensed possession of certain types of firearms.

42 See 16 C.F.R. §§ 1201-1306 (1999) (detailing CPSC product safety regulations and bans). The agency has created additional rules under other consumer protection statutes that provide it with additional authority. See, e.g., 16 C.F.R. §§ 1507-1512 (1999) (regulations for hazardous substances); 16 C.F.R. §§ 1610-1632 (1999) (regulations for flammable fabrics); 16 C.F.R. §§ 1700-1702 (1999) (regulations for poison prevention). Even taking these regulations into account, manufacturers have relatively few CPSC guidelines to look to in designing products for consumer distribution.

43 Thus, while not itself constituting a specific "hole" in the safety net, the dearth of new CPSC regulations may gradually make manufacturers believe that they have less to fear from the CPSC. This causes a general weakening of the deterrent effect of the first tier of the net, which, when lined up with areas of weakness in the second (tort) tier of the safety net, creates *de facto* gaps in consumer protection by not offering significant combined deterrence to thwart unsafe product design.

44 See, e.g., SMART GOVERNMENT, *supra* note 26, at 3 (noting the CPSC's current position that "smart government need not be mandatory, . . . regulatory . . . [or] rigid"); *id.* at 7 (noting that the CPSC settles for voluntary standards that exempt some children's garments from corrective design changes); *id.* at 9 (deferring to industry on standards needed for certain cribs); *id.* at 26 (noting that the CPSC only shifts from tentative voluntary standard to actual regulation when industry requests this action in order to preempt tougher impending state standards).

45 This will also be true if the industry has been successful in its attempts to compromise the regulator's independent judgment. This phenomenon of "agency capture" has been discussed in

2. Defects in Tort Deterrence

Just as the true value of regulatory deterrence is questionable (or nonexistent) for certain types of products, the efficacy of tort deterrence turns in part on the kinds of goods at issue. While a variety of products may raise their own unique difficulties, the shortcomings of tort deterrence are particularly acute where products are the center of public policy debate, require skill in handling to assure safe use, or are sophisticated devices used in complex circumstances.

Products that are at the center of a public policy debate are the worst subjects for effective tort deterrence. Courts are often reluctant to involve themselves in policy debates that they view as more appropriate for the legislature.⁴⁶ Indeed, a judge may feel that the law is being misused by plaintiffs to further a social agenda, rather than for its original purposes of compensation, deterrence, or cost-spreading. When faced with such an issue, there is at least a possibility that a court will simply reject the suit out of hand.⁴⁷ Such courts may determine that, given the pendant social concerns actually propelling the case, tort law is a poor vehicle for resolving the issue.⁴⁸ This has been repeatedly true in firearm safety cases,

other literature. See generally Dion Casey, *Agency Capture: The USDA's Struggle To Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y 142 (1998); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). While not addressed in detail here, agency capture demonstrates yet another potential pitfall of relying on a single administrative entity to protect consumers.

46 See, e.g., *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (declining to eliminate industry by judicial fiat); *Leslie v. U.S.*, 986 F. Supp. 900, 912 (D.N.J. 1997) (declining to place a judicial ban on legal products); *Mavilla v. Stoeger Indus.*, 574 F. Supp. 106, 111 (D. Mass. 1983) (deferring to legislature's consistent rejection of proposals banning handguns); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465, 467 (Ga. Ct. App. 1984) (holding that no strict liability existed without a defect absent legislative action). Some courts have noted that administrative agencies are a better forum for such policy debates. See e.g., *Wasylow v. Glock Inc.*, 975 F. Supp. 370, 381 (D. Mass 1996).

47 See, e.g., *Martin*, 743 F.2d at 1204 ("Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns."). Although far less common, there can be instances where the appearance of important issues in product safety litigation might sway certain judges in a more interventionist direction. See, e.g., *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1153 (Md. 1985) (applying strict liability to the sale of various types of handguns in Maryland), *overruled by* MD. ANN. CODE art. 27, § 361(h) (West 1996); see also *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 161, 163-72 (allowing plaintiff's negligence claim to go forward on an important firearm product case). While the actual holding in *Merrill* may make sense in light of Navegar's apparent statutory violations and unlawful marketing techniques, supporting dicta used by the majority to bolster its holding can be seen as ignoring plain tenets of California tort law. *Id.* at 193 (Haerle, J., dissenting) (condemning majority opinion as "an egregious exercise in judicial legislation"). Whether the majority position in *Merrill* will survive further appeal remains to be seen.

48 See, e.g., *Wasylow*, 975 F. Supp. at 380-81. ("It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either 1) ban some classes of handguns or 2) transform firearm enterprises into insurers against misuse of their products."); cf. *Kyte v. Philip Morris Inc.*, 556 N.E.2d 1025, 1029 (Mass. 1990) (noting in dicta that "[m]anufacturers of . . . firearms . . . are not

where courts have been reluctant to condemn entire lines of products for failing to have certain safety devices or otherwise failing to protect against harm or misuse.⁴⁹

While many courts explicitly decline to resolve such policy issues via tort law, others are less direct. Whether purposefully or as a byproduct of refining tort doctrine so that it more cleanly adheres to its goals without unnecessarily impacting unrelated matters, many courts apply a strict construction to tort law elements in politically sensitive cases. This approach is manifest in many firearm safety suits, where courts have applied restrictive concepts of duty,⁵⁰ foreseeability,⁵¹ and causation.⁵²

subject to liability simply because they know that their product may be sold to or used by persons who by law may not buy or use it").

49 See *Wasylow*, 975 F. Supp. at 381 ("[C]ourts have not imposed liability for categories of products that are generally available and widely used and consumed, solely on the ground that they are considered socially undesirable by some segments of society. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited."); see also *Mavilla*, 574 F. Supp. at 111 (stating that Massachusetts social policy permits handgun use and ownership); cf. *Martin*, 743 F.2d at 1204 (stating that guns are not unreasonably dangerous, and Illinois regulates but does not ban handgun possession).

50 See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (finding no special relationship to a criminal that makes the manufacturer responsible for ensuring that the criminal does not get Black Talon Ammo); *Leslie v. U.S.*, 986 F. Supp. 900 (D.N.J. 1997) (holding that duty to prevent party from using a product to hurt others will only arise if there is a special relationship); *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 370 (S.D.N.Y. 1996) (declining to extend a general duty to public); *Raines v. Colt Indus., Inc.*, 757 F. Supp. 819, 824 (E.D. Mich. 1991) (stating no duty to warn or protect if danger is open and obvious to reasonable user, regardless of subjective state of mind of this particular user); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 203-04 (Ark. 1995) (finding no relevant duty and dismissing tort suit against gun manufacturer); *Rhodes*, 325 S.E.2d at 467 (finding no breach of duty if product meets general consumer expectations as conceived by the court); cf. *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713 (Haw. 1982) (stating that no new duty on dealer stems from federal firearm statute); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985) (finding no duty to control distribution); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. Ct. 1984) (holding no duty on manufacturer to regulate retail resale practices); *Forni v. Ferguson*, 648 N.Y.S.2d 73 (App. Div. 1996) (finding no duty to refrain from lawful distribution). But see *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996). However, the novel approach in *Hamilton*, which espoused an expansive collective liability theory, is at odds with existing case law, and the Second Circuit may reject the approach after review of the trial results.

51 See, e.g., *Raines*, 757 F. Supp. at 819 (stating that it is not foreseeable that someone would point a gun, even though he thought it would not fire); *Sturm, Ruger & Co. v. Bloyd*, 586 S.W.2d 19 (Ky. 1979) (holding that the manufacturer need only foresee uses in line with the warnings in the manual, and owner's negligence was an intervening cause); cf. *Talkington v. Cricket BV*, 152 F.3d 254 (4th Cir. 1998) (stating that South Carolina, which bases strict liability on expected use rather than foreseeable use, may hold defendant liable for negligent design, which encompasses design for foreseeable use, while not being liable on strict liability); *Quinnett v. Newman*, 568 A.2d 786 (Conn. 1990) (stating that actions of an intoxicated person supersede bar's decision to serve alcohol in an accident case, but underage drinkers would be deemed at law incapable of voluntary action needed to break causal chain). But see *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985) (stating that a manufacturer can be liable for criminal use of a cheap handgun whose design caters to criminals). However, the *Kelley* rule was not adopted by other courts and was subsequently overruled by the Maryland Legislature. See MD. ANN. CODE art. 27, § 361(h)(1) (West 1996) ("[a]n entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person . . .").

These courts have also endorsed expansive interpretations of doctrines that serve as *de facto* defenses for product manufacturers by broadly interpreting what constitutes unreasonable use by a plaintiff⁵³ and what level of functional interference makes an alternative design unacceptable as a matter of law.⁵⁴ In addition, courts facing policy-driven cases that creatively use tort law may be more willing to consider innovative defenses.⁵⁵

Moreover, products subject to intense policy debates generate other laws and standards that may interfere with tort deterrence. For example, in an effort to improve firearm safety, some state legislatures enacted statutes requiring parents to limit child access to firearms.⁵⁶ In those states, when a child picks up a defective handgun and injures herself, the chances for a successful tort recovery against the manufacturer are likely diminished.⁵⁷ The manufacturer can argue a break in causation,⁵⁸ the elimination of its duty by the new statute,⁵⁹ and other defenses. The manufacturer also may implead the child's parent as a defendant.⁶⁰ By doing so, the manufacturer may decrease its ultimate liability through indemnity or by a division of

52 See, e.g., *Treadway v. Smith & Wesson Corp.*, 950 F. Supp. 1326, 1336 (E.D. Mich. 1996) ("[O]nly a defective person would fail to realize [these] obvious dangers."); *Smith v. Sturm, Ruger & Co.*, 695 P.2d 600 (Wash. Ct. App. 1985) (upholding verdict against plaintiff based on his unreasonable use of handgun by carrying gun with hammer down on a full chamber).

53 See *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16 (D. Mass. 1997); *Wasylyow v. Glock Inc.*, 975 F. Supp. 370 (D. Mass. 1996); *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342 (1982).

54 See *Wasylyow*, 975 F. Supp. at 370 (holding that safeties interfere with firing and thus are not alternative design); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465, 465 (Ga. Ct. App. 1984) (holding that lack of childproofing is not a defect). This is not to say that all defective product cases involving firearms are rejected in this way. Some cases, especially those that focus on firearm defects that have long been considered below industry standard, such as guns that discharge when they are dropped, are successful. See, e.g., *International Armament Corp. v. King*, 686 S.W.2d 595 (Tex. 1985). However, cases that seek to improve the current industry standard or that seek to eliminate harm by requiring childproofing or use-limitation devices are more often rejected on the grounds discussed above. The presence of cases that simply seek to eliminate all handguns based on their lack of "social utility" no doubt add to courts' suspicions that non-traditional firearm cases concern social policy more than producing a reasonably safe product.

55 Cf. *Bender v. Browning*, 517 S.W.2d 705 (Mo. App. 1974) (discussing "antique exception," but not applying it because the gun was modified to hold modern ammunition).

56 See, e.g., DEL. CODE ANN. tit. 11, § 1456 (West 1998); FL. STAT. ANN. § 790.174 (West 1999); N.C. GEN. STAT. § 14-315.1 (West 1999).

57 There is no indication in these laws that the purpose of the provisions was to limit manufacturer responsibility to make safe products. Rather, the statutes expressly further enhanced child protection by giving adults an extra reason to lock up their guns. See, e.g., IOWA CODE ANN. § 724.22(7) (West 1999) ("access to loaded firearms by children restricted-penalty"); VIRGINIA CODE ANN. § 18.2-56.2 (West 1996) ("[I]t shall be unlawful [to] recklessly leave a loaded, unsecured firearm in such a manner as to endanger the life or limb of any child under the age of 14."). However, an unintended consequence of this and similar legislative actions relating to high profile safety issues is to alter the litigative landscape and weaken the tort tier of the safety net for that product.

58 See, e.g., *Sturm, Ruger & Co. v. Bloyd*, 586 S.W.2d 19, 19 (Ky. 1979) (stating that negligence by gun owner is an intervening cause).

59 Cf. *Rhodes*, 325 S.E.2d at 465 (holding that there is no duty to childproof where no statute demands it).

60 See, e.g., ARK. R. CIV. P. 19; MASS. R. CIV. P. 19; NEV. R. CIV. P. 19.

comparative negligence. This predictable drop in potential liability costs will decrease the deterrent effect and thus limit the effectiveness of the tort portion of the safety net in such circumstances.

The tort system is also less effective in promoting safe product design for products that require skill to operate safely. While this may at first seem counter-intuitive—after all, such products are most in need of safety devices—the burden of proof in tort cases makes it unavoidable. Each tort suit focuses only on the victim at hand.⁶¹ A monetary judgment (and its deterrent effect) flows only from proof that a particular plaintiff was harmed by a particular product's defect at a particular time.⁶² When a device requires training for proper use, a plaintiff may find it difficult to prove that it was the device, not the user or some intervening cause, that was legally responsible for the injury.⁶³

Some jurisdictions have limited the intervening cause doctrine where a special duty or direct consumer-seller relationship exists.⁶⁴ Nonetheless, judges or juries may determine that when items are placed in improper hands, it is not the product that was at fault.⁶⁵ To paraphrase the Supreme Court of Kentucky in a case where a gun owner handled a gun in an

61 See LOUIS S. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* §1.08 (2000).

62 The plaintiff also must show that a better design would have prevented the accident in those specific circumstances. See *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762 (E.D.N.Y. 1981) (ruling that plaintiff could not show a heavier trigger would necessarily have stopped this particular accident where plaintiff contended that a light trigger pull caused the injury).

63 See, e.g., *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996) (holding that the sale of a gun to a criminal furnishes a mere "condition" for harm and not the "cause"); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (holding that a criminal breaks causation absent a special relationship between the manufacturer and injured user); *Bloyd*, 586 S.W.2d at 19 (finding negligence by owner); *Bennet v. Cincinnati Checker Cab Co.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (holding that criminal acts are not foreseeable).

64 See, e.g., *Decker v. Gibson Prod.*, 679 F.2d 212 (11th Cir. 1982) (stating that the foreseeability of a criminal act stemming from a dealer's gun sale is an issue for the jury); *Pavlidis v. Niles Gun Show*, 637 N.E.2d 404 (Ohio App. 1994) (stating that the criminal act of a youth shooting someone after stealing a poorly secured gun at a gun show is not a superseding cause because a reasonable jury could have determined it was foreseeable).

65 See, e.g., *Wasylyow v. Glock Inc.*, 975 F. Supp. 370 (D. Mass. 1996) (finding that a plaintiff who shot himself while trying to fit a Glock in its box was more than 50% negligent); *Treadway v. Smith & Wesson*, 950 F. Supp. 1326 (E.D. Mich. 1996) (ruling that Michigan's "obvious and open" danger rule precluded handgun manufacturer's liability when boy fiddled with a gun's hammer); *Dias v. Daisy-Heddon*, 390 N.E.2d 222 (Ind. App. 1979) (ruling that a plaintiff who shot an air gun negligently is the proximate cause of his own injuries); *Bloyd*, 586 S.W.2d at 19. This doctrine may apply only to negligence tort claims. See, e.g., *Colter v. Barber-Green*, 525 N.E.2d 1305 (Mass. 1988) (finding that comparative negligence does not apply to negligent design); *MacCuish v. Volkswagenwerk*, 494 N.E.2d 390 (Mass. App. Ct. 1986) (asserting that the victim's failure to wear a seatbelt was not relevant to the breach claim, because comparative negligence does not apply to non-negligence claims). However, product tort claims under strict liability are still subject, de facto, to analogous limitations. See, e.g., *Talkington v. Cricket*, 152 F.3d 254 (4th Cir. 1998) (finding manufacturer liable under state law strict liability doctrine only if victim used product in proper expected fashion); *Correia v. Firestone*, 446 N.E.2d 1033 (Mass. 1982) (discussing how plaintiff misuse can thwart claim); *Zahrte v. Sturm, Ruger & Co.*, 661 P.2d 17 (Mont. 1983) (varying application of assumption of risk based on victim's behavior).

unskilled fashion, "guns don't kill people, people kill people."⁶⁶ It may be difficult to convince a fact finder otherwise.⁶⁷

Critically, under most tort theories, the plaintiff must show that an alternative design would have avoided her particular injury.⁶⁸ When a product requires skill to operate properly, it is often difficult to show that a given design change would have altered the outcome. Bumbled handling of a product may well have caused the injury even if the safety device were in place.⁶⁹ Thus, even if a safety device generally would prevent numerous accidents, a tort victim may not be able to prove that the safety device would have prevented the particular accident. This increased uncertainty diminishes the deterrent effect of tort law on product design.⁷⁰

Shifting responsibility to consumers, as the tort law effectively does in the area of complex devices, is an ineffective way to prevent many types of accidental injuries. Consumer behavior is notoriously difficult to alter.⁷¹ Even in instances where consumers can retrain their use habits, this will not prevent a momentary loss of concentration, or tripping and falling, or other types of situations where even the best intentions of consumers are of no avail (this is also true, for instance, with many child injuries). Thus,

66 See *Bloyd*, 586 S.W.2d at 21 ("By their very nature, firearms are dangerous, but do not kill people. It is the action of people in their use of firearms that kill or injure people.").

67 Some jurisdictions still allow some version of assumption of the risk as a defense to tort liability. See, e.g., *Zahrte*, 661 P.2d at 17 (Mont. 1983) (holding that assumption of risk applies in strict liability even though contributory negligence does not apply as plaintiff cannot recover when she unreasonably and knowingly subjects herself to the danger). Where a device requires skill to operate safely, the victim is almost tautologically assuming the risk that his failure to meet that standard of care will put him in danger. Such a doctrine makes a successful suit even more difficult. See, e.g., *Wayslow*, 975 F. Supp. at 370.

68 See *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16 (D. Mass. 1997); *DeRosa v. Remington*, 509 F. Supp. 762 (E.D.N.Y. 1981); *Killeen v. Harmon Grain Co.*, 413 N.E.2d 767 (Mass. App. Ct. 1986). But cf. *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1249 (Ohio 1998) (applying a generalized risk/benefit test to a design with no specific reference to the need for proof of causal connection to the injury).

69 See *DeRosa*, 509 F. Supp. at 762 (finding no proof that alternative design would have prevented harm in design defect case, thus no recovery); *Bolduc*, 968 F. Supp. at 16 (ruling that alternate design of magazine safety interferes with firing, and because general users would find that the device takes away from functionality, there is no case for the jury); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (holding that plaintiff failed to show alternative design); see also *Allen v. Chance Mfg. Co.*, 494 N.E.2d 1324 (Mass. 1986); *Fahey v. Rockwell Graphic Systems, Inc.*, 482 N.E.2d 519 (Mass. App. Ct. 1985); *DiFrancesco v. Excam*, 642 A.2d 529 (Pa. Super. 1994).

70 Although some might say that the application of such legal principles to product tort cases simply reflects public policy choices embedded in the common law and state tort statutes, it nonetheless represents just as much of a "hole" in this level of the safety net as the statutory exemptions to CPSC authority. Both can be said to reflect existing public policy, as both are the result of the current state of the law. But both leave consumers to bear the brunt of a manufacturer's decision to sell defective goods and thus represent "holes" in the protection afforded to consumers under the current safety regime. This Article categorically rejects the idea that the current safety net, even to the extent that it represents current public policy, should not be bolstered so as to provide additional consumer protection. Indeed, the purpose of this Article is to point out areas where consumers are not currently protected from shoddy design and to suggest a way to put such protections in place.

71 See *WILSON ET AL.*, *supra* note 40, at 9-10.

injury may best be avoided simply by fixing the product.⁷²

Similarly, even when the product does not require a skilled operator, the tort system may not function well if the product is complex.⁷³ Many product liability claims have foundered on plaintiff's inability to show a causal connection between a product defect and the injury incurred or how an alternative design would have avoided the injury.⁷⁴ Even where a product is obviously unsafe, a plaintiff's inability to demonstrate that the product's defect caused the accident can save a manufacturer from liability. These difficulties of proof are exacerbated in cases involving complicated devices. Such products can pose vexing issues regarding proof of malfunction.⁷⁵ If it is hard to prove specifically what went wrong with the product in a given instance because so many factors go into it working correctly in the first place,⁷⁶ it is more difficult to prove an alternative design would have prevented the injury. The absence of such proof substantially reduces the likelihood of recovery. While certain jurisdictions recognize these additional difficulties and attempt to compensate for them,⁷⁷ the tort system does not optimally ensure the safety of complex products.

The shortcomings of tort deterrence noted above are in addition to the general defects characteristic of tort law. As a general matter, tort deterrence provides only inexact guidance to manufacturers regarding safe product design. While many producers may be large and sophisticated enough to determine the most reasonable safety measures to employ, others will not have this expertise, will make mistakes, or will simply guess wrongly. In addition, even when tort law works properly, it often sets a fairly low threshold for product safety. Current litigation doctrine

72 See, e.g., *Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978).

73 In many instances, these will be the same products as those requiring skill to operate, but this is not always the case. An internally complex device might be operated by a simple push of a button.

74 See, e.g., *Hamilton*, 935 F. Supp. at 1307 (rejecting certain claims for failure to proffer proof that an alternative design that would avoid the accident); see also *supra* note 68 and accompanying text.

75 This is also true with products designed to be used in complicated circumstances, such as devices designed to be used for personal security in tense and urgent situations. A product operated in circumstances where potential intervening causes are prevalent may result in a more complicated causal picture, thereby making a finding of liability even more remote. See *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16 (D. Mass. 1997); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370 (D. Mass. 1996).

76 Some courts establish a high threshold for considering products to be complex. See, e.g., *Raines v. Colt Indus., Inc.*, 757 F. Supp. 819 (E.D. Mich. 1991) (holding that handguns, which have complex firing and control mechanisms and dozens of interacting parts, are simple tools because they are not "highly mechanical"). That determination may be a further example of a court applying a doctrine to block suits in politically sensitive areas. In *Raines*, the finding that handguns were a "simple" device allowed the court to reject the suit under Michigan law. See *id.* at 824-25.

77 Some courts, for instance, eliminate the "open and obvious" defense when it comes to complex devices. While theoretically this could serve to re-balance the playing field in those suits, courts have often applied the doctrine restrictively. See *id.*

does not require the producer to use the safest design or even to choose the most prudent one.⁷⁸ In many instances, consumer expectations, rather than objective safety data, govern liability.⁷⁹ Thus, producers' incentives to innovate and adopt proven safety technologies from other market arenas remain limited.

In addition, tort law often provides weak incentives to modify product defects that pose relatively minor potential for injury. Although class actions may provide formidable deterrence, this procedural device is unavailable in some product liability suits due to the individualized nature of the harms involved.⁸⁰ Moreover, suits by third parties to recover for the victims' injuries are often untenable. In many states, neither a subrogation claim by insurers⁸¹ nor a direct action by the providers of medical services⁸² can be brought at common law. Public entities that attempt similar suits may also face hurdles, especially if no special enabling statutes exist to establish standing.⁸³ The recent trend among cities to file suits against handgun manufacturers provides a useful example. As an initial matter, these cities will need to show that they actually lost money if they intend to recover damages. Even if such damages exist (and in many

78 See, e.g., *Torre v. Harris-Seybold*, 404 N.E.2d 96 (Mass. App. Ct. 1980) (agreeing that the manufacturer is not required to design the safest possible product or guard against all remotely possible dangers); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979) (concluding that the state of the art is irrelevant to determining product defect).

79 See *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1985); *Mavilla v. Stoeger Indus.*, 574 F. Supp. 106 (D. Mass. 1983) (concluding that there is no breach if handgun meets consumer expectations, because consumers know handguns are dangerous); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465 (Ga. Ct. App. 1984).

80 See, e.g., *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (rejecting class because no scientific causation issues in common). *But cf. In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (S.D.N.Y. 1983). Generally, courts are reluctant to certify large product liability class actions because, for instance, "no single proximate cause applies equally to each potential class member and each defendant." *In re N.D. Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7 FEDERAL PRACTICE & PROCEDURE § 1805, at 541-43 & n.11 (2d. ed. 1987).

81 See, e.g., *Frost v. Porter Leasing*, 436 N.E.2d 387 (Mass. 1980) (finding no implied right of subrogation for insurer to recover medical costs); *United States Fidelity and Guar. Co. v. N.J.B. Prime Investors*, 377 N.E.2d 440 (Mass. App. Ct. 1978) (concluding that volunteer has no rights of subrogation).

82 See, e.g., *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92 (Mass. 1993) (ruling out recovery where oil spill resulted in construction delay); *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 182 N.E. 477 (Mass. 1932) (finding that employer cannot recover from employee's tortfeasor); *Minnesota v. Phillip Morris*, 551 N.W.2d 490 (Minn. 1996) (rejecting common law claims for Blue Cross to recover medical costs). *But see Stop & Shop v. Fisher*, 444 N.E.2d 368 (Mass. 1983) (permitting nuisance recovery for money lost as a result of physical harm); cf. *Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350 (Mass. 1989) (acknowledging a distinction for a personal injury case).

83 See, e.g., *United States v. Standard Oil*, 332 U.S. 301 (1947) (rejecting any common law right for the United States to recoup medical expenses for treating a soldier injured in a car crash); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 997-98 (1981) ("[T]here seems to be no authority for common law recovery by a town of its expenses in fighting a fire Safeguards against fire are maintained 'for the benefit of the public and without pecuniary compensation or emolument.'").

instances the cities may be fully reimbursed or may never have owned the facilities that spent money on medical care in the first place; non-medical expenses such as police expenditures may be difficult to attribute to the defective product), the case law provides several examples of suits where the government's attempts to recoup money has been thwarted.⁸⁴ In the multi-state suits against tobacco manufacturers, several states were shielded from these difficulties by statutes that specifically authorized states to recover Medicaid payments. The lack of such a special statutory authorization in the city gun cases is already having an impact on those suits.⁸⁵

Finally, the case-by-case nature of tort litigation provides an imperfect mechanism to enforce product safety. Because the tort system refines its guidance as each case is adjudicated, case law guides manufacturers only after injured consumers litigate a case to completion. Further, the tort system functions as a deterrent only if manufacturers believe it will be used aggressively. The system must make an example of manufacturers who misjudged what the law would require in terms of design, even if the miscalculation was an innocent one. Thus, the system depends on sacrifices by both consumers (who must be injured to employ the tort system) and manufacturers (who are forced to guess at the correct standard and are penalized when they guess wrong). Such an approach contrasts starkly with the first tier of the safety net, which provides prospective guidance on product design. The second tier may generally function adequately, but when the deterrent function is further compromised by the circumstances described above, it provides too little protection at far too great a price.

Thus, the dual safety net fails to protect consumers from certain types of unreliable or dangerous consumer products. These include products exempted from CPSC regulation that are also (1) goods that are at the center of a public policy debate, (2) goods that require skill in handling, or (3) complex devices used in complex circumstances.⁸⁶ Handguns are perhaps the best example of a consumer product meeting these criteria.

84 See, e.g., *Standard Oil*, 332 U.S. at 301; *Freetown*, 423 N.E.2d at 997.

85 See, e.g., *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353 (Fla. Cir. Ct. 1999) (dismissing Miami's gun suit on multiple grounds including standing and remoteness of damages); *Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369 (Hamilton Cnty. Ct. Ohio) (order dated Oct. 7, 1999) (dismissing Cincinnati gun suit on grounds similar to those in *Penelas*); *Ganim v. Smith & Wesson Corp.*, No. X06-CV-99-0153198S, 1999 WL 1241909 (Conn. Super. Ct.) (order dated Dec. 10, 1999) (dismissing Bridgeport suit).

86 These criteria are not exclusive. Other types of goods also may fall through the net and pose risks to consumers. Indeed, even goods that do not completely fall through the safety net may nevertheless be at increased risk of product safety problems due to a lessening of deterrence. This is most likely to happen where the products fall through only one tier of the safety net but are also particularly subject to the general shortcomings of the other tier—for instance, a product at the center of a public policy debate in an industry where the CPSC's lack of regulatory action has begun to erode the agency's deterrent effect.

Patching the Holes in the Consumer Product Safety Net

Goods like defective handguns currently subject consumers to high degrees of risk, and neither federal regulations nor tort deterrence are likely to ameliorate this problem.⁸⁷ To optimally safeguard the public, another method of protection is needed.

D. *How Best To Solve the Problem: Some Alternatives*

A variety of options previously used to cure other public policy shortcomings present potential solutions to the flaws in the current product safety system. The most obvious approach might be to alter the statutory scheme. Congress could set specific consumer product safety standards for problematic goods. Alternatively, Congress could remove the exemptions from the current federal regime and allow federal regulators to set the standards. Neither alternative is realistic. The current federal exemptions are not an oversight. They represent the political calculus necessary to pass federal consumer protection laws in the first place.⁸⁸

Notwithstanding recent relevant tragedies involving exempted products such as handguns, this balancing of interests has not changed. While Congress occasionally tackles certain specific aspects of a high profile safety issue, those piecemeal provisions are no substitute for a comprehensive approach to consumer product safety. Moreover, a small and determined legislative minority can keep the law at the status quo and frustrate a large majority in favor of comprehensive legislation.⁸⁹ Thus, federal legislative action is unlikely to change the safety framework in the near future. State legislation suffers from the same improbabilities of

87 Firearms provide a graphic example of how dangerous the current situation is. Over 1500 people are killed by firearm accidents every year in the United States. See *infra* note 293 and accompanying text. The GAO has predicted that a large portion of these injuries could be prevented with basic safety mechanisms, which certain manufacturers simply choose not to use. See *infra* note 295 and accompanying text. Neither federal regulation, which expressly does not apply, nor tort deterrence provides any protection from the sale of defective firearms that cause these deaths.

88 Even if Congress favored plugging the holes in the safety net, direct congressional standard setting would be impractical. Comprehensive product standards require a great deal of time to develop. Congress is unlikely to devote a substantial portion of its deliberative sessions to specific regulations on product safety. Indeed, the legislative history of at least one consumer protection statute reflects these concerns, and the qualms in the Congress regarding lobbying pressures that could stem from direct congressional involvement in the standard setting process. See, e.g., 126 CONG. REC. S5688 (daily ed. May 21, 1980); 126 CONG. REC. H3861 (daily ed. May 20, 1980); 126 CONG. REC. S1052, 1077-81, 1093-98, 1237 (daily ed. Feb. 6, 1980); 125 CONG. REC. H10757, 10772, 11204 (daily ed. Nov. 14, 1979).

89 See KEITH KREIBEL, PIVOTAL POLITICS 93-97 (1998) (discussing legislative gridlock and filibuster processes). See generally J. CHAMBERLAIN, LEGISLATIVE PROCESSES: NATIONAL AND STATE 174-85 (1969) (discussing legislative obstruction). Lobbyists need to be successful only with a relative handful of legislators in order to obtain their objective. If the lobbyists approach 100 legislators but find only five percent are subject to various means of persuasion, that may still be enough to block a standard. This differs strikingly from the situation where standards are set by an independent regulator. There, a five percent success rate portends failure for the lobbyists, as they must convince the top regulator in order to divert the safety measure.

success.⁹⁰

Another approach involves relying on local action by municipalities to cure the defects. Cities and towns might attempt this by either launching tort suits against errant manufacturers or enacting product-standard bylaws. Neither approach truly solves the consumer safety problem.

The tort approach would require a city, or a group of cities, to commence litigation against the manufacturers of defective products. The cities might try to bring such actions on behalf of their citizens, or claim that they are suing to recover municipal funds expended to ameliorate the injuries or damage caused by the defective goods. This strategy has recently been adopted by a coalition of cities concerned with firearm defects.⁹¹ However, as discussed in Part I.C.2, the tort system does not work effectively in such circumstances. Consequently, these suits are unlikely to provide the necessary consumer protection solution. Indeed, municipalities are even less likely to succeed in tort suits than private plaintiffs, as the cities will have difficulty meeting standing and related requirements.⁹²

90 State legislatures occasionally have passed laws containing product safety requirements in response to a high profile problem. The best example of this phenomenon is the legislative response to handgun injuries. Several legislatures have enacted at least a few handgun standards. See *infra* note 299. Indeed, California just recently adopted such a set of provisions. See CAL. PENAL CODE §§ 12,125-12,133 (West 1999). However, such legislation usually provides for criminal sanctions rather than flexible civil enforcement and fails to fully address the safety issues posed by defective handguns. In addition, to the extent that these statutes fail to delegate the task of crafting specific standards to an administrative agency, the legislatures provide no method for updating or altering the safety criteria as industrial developments require. Thus, while making an admirable attempt to address a high profile issue, these legislatures fail to enact a comprehensive or long term solution ensuring that the dangers will resurface in the future. Moreover, the exemptions and loopholes in these laws (whether lax standards, difficult enforcement criteria, or, in the case of Maryland, the delegation of standard-setting authority to a board including industry representatives) demonstrate how legislative compromise, which is necessary to pass such a bill, precludes direct statutes as an effective way to patch the safety net. See MD. CODE ANN., art. 27, § 36J (West 1996). It is theoretically possible to enact state legislation that will not suffer from these infirmities, but it is unlikely. See, e.g., Md. Sess. Law (2000), ch. 2 § 1. The recent supplemental Maryland gun law was touted as the first in-the-nation requirement for built-in gun locks. See Daniel LeDuc, *With President on Hand, Gun Locks Become Law; Glendening Signs Measure Requiring Childproof Devices*, WASH. POST, Apr. 12, 2000, at B4. The law, however, fails to require such locking devices in its actual text and, thus, allows the industry to argue that most existing guns already comply with the new law.

91 See J. Gibeaut, *Gunning for Change*, A.B.A. J., Mar. 2000, at 48, 48-52.

92 Regardless of these difficulties, proponents of the municipal tort suit approach might argue that manufacturers will proffer safety accommodations rather than face protracted and costly litigation. While a recent settlement between the city gun-suit coalition and a major handgun manufacturer appears to lend support to this position, the efficacy of the municipal tort suit approach remains in question. See Susan Milligan, *Gun Maker To Add Safety Measures; Clinton Hails Smith & Wesson*, BOSTON GLOBE, Mar. 18, 2000, at A1. Indeed, it is unclear whether the gun settlement produced any changes that the company had not already been contemplating. A Smith & Wesson spokesman has stated that "the things that we have agreed to do are things that we have been doing, things that have been in our planning process to do, and it really hasn't done anything other than accelerate some of the programs that we've been working on." Ken Jorgenson, Remarks on *Talk of the Nation* (National Public Radio broadcast, Mar. 21, 2000) (transcript on file with author). Moreover, this type of settlement process simply cannot provide comprehensive consumer protection. To the

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Perhaps more importantly, the “sue and settle” approach does not cabin the behavior of future market entrants. It does not even encompass all current market producers, covering instead only those that acquiesce. The manufacturers most committed to keeping their present product designs intact, without additional safety modifications, would not be inclined to settle. They would more likely rely on tort case law and litigate their cases to conclusion.⁹³ Even if these companies were to lose a few cases to cities at the trial level, they might still refuse to compromise and instead rely on the appellate courts to reverse those decisions.

In addition to launching a tort suit, a municipality might consider enacting consumer product safety bylaws. This technique shows some promise and has been used over the last few years on the West Coast to address the issue of defective handguns.⁹⁴ Nonetheless, several shortcomings make this approach ineffective as a general solution to the holes in the safety net. First, municipalities might be able to focus on high profile issues like defective handguns, but it seems unlikely that city councils will be willing or able to address more mundane product safety issues. Second, most municipalities are unlikely to have the focus, expertise, or funding necessary to set standards for most products that fall through the safety net.⁹⁵ Third, in many jurisdictions, state law does not allow municipalities to make such decisions.⁹⁶ Finally, municipal bylaws will only reach the city limits. A city-by-city approach will necessarily create a confusing array of regulated and unregulated communities, leaving many consumers exposed to safety risks and undermining the

extent that a settlement results from a coalition of municipal suits, it seems unlikely that the coalition could be reassembled repeatedly in the future when the industry refuses to alter its designs to meet safety risks not identified at the time of the initial settlement. Thus, the approach fails to provide the continued deterrence or oversight needed in consumer safety issues.

93 Cf. *Costa Mesa, Calif., Gun Maker Unlikely To Join Gun Regulation Agreement*, ORANGE COUNTY REG., Mar. 23, 2000, at A6 (rejecting the Costa Mesa coalition’s proposal of settlement by Bryco Arms); *Glock Decides Not To Join Gun Industry Settlement*, L.A. TIMES, Mar. 22, 2000, at A4 (stating that, according to a Glock spokesman, its refusal to compromise is “a matter of principle”).

94 Over 70 towns and counties in California have adopted bylaws that bar the sale of defective handguns within municipal/county limits of defective handguns. See CALIFORNIA WELLNESS FOUND., LOCAL ORDINANCE SURVEY, COMMUNITIES ON THE MOVE 2-7 (1998).

95 Product safety regulation is a time-consuming, expertise-intensive, and expensive exercise. The California municipal handgun effort has shown that at least some larger communities can muster the expertise to draft well-reasoned and intricate product safety regulations. See *id.* While smaller communities could hire consultants to assist them, or rely on the work of other larger local governments, it is unclear to what extent state law or constitutional requirements demand that they have their own bases for adopting the standards at issue.

96 See, e.g., ALA. STAT. CODE 11-45-1.1 (1989); MD. ANN. CODE art. 27, § 36H (West 1996); W. VA. CODE § 8-12-5(a) (1998). See also *HC Gun & Knife Shows, Inc. v. Houston*, 201 F.3d 544 (5th Cir. 2000) (upholding preemption of city ordinance); *Amherst v. Attorney Gen.*, 502 N.E.2d 128, 130 (Mass. 1986) (noting in dicta that local ordinances are preempted if they conflict with state legislation occupying the field). But cf. *California Rifle and Pistol Ass’n v. City of West Hollywood*, 79 Cal. Rptr. 2d 591, 601 (Cal. Ct. App. 1998) (stressing strong California presumption against such preemption).

protection in those communities where regulations are in place.⁹⁷

In addition to federal statutory and community bylaw initiatives, two other traditional consumer protection remedies deserve consideration. Both voluntary standards and the use of informational warnings have been utilized as useful remedies to consumer protection problems. Federal agencies often tout voluntary standards as setting meaningful minimum safety thresholds without the need for regulation.⁹⁸ Similarly, warnings and disclosures of additional information have been adopted by at least one federal consumer protection agency as the central (though not exclusive) tool for addressing consumer protection.⁹⁹ Unfortunately, neither of these tools can realistically plug the holes in the consumer product safety net.

Voluntary standards cannot work in the very areas that are of greatest concern—those where federal regulators have no leverage to require product safety improvements.¹⁰⁰ Voluntary standards in these industries will necessarily be watered down, unenforced, and not even adopted by the fringe producers whose goods cause the greatest consumer risk in the first place.¹⁰¹ Similarly, warnings fail to solve the safety problem in key

97 Indeed, just such a mosaic lies at the center of Chicago's recent claims against the handgun industry. See *Complaint, Chicago v. Beretta U.S.A. Corp.* (No. 98-CH15596). Chicago has alleged that its own bylaws are subverted by unscrupulous commercial activity in adjacent towns, where safety standards and other restrictions are not in place. See *id.* at ¶¶ 36-42. There is even a possibility that the gun industry could try to challenge certain of the California municipal gun safety bylaws noted above, based on a claim that the new California Penal Code provisions on junk handguns occupy the field. Cf. *Doe v. City and County of San Francisco*, 186 Cal. Rptr. 380, 383-85 (Cal. Ct. App. 1983) (rejecting local prohibitions on gun possession because of state regulation of this issue and discussing implied preemption).

98 See, e.g., SMART GOVERNMENT, *supra* note 26, at 6; see also Adler, *supra* note 25, at 97-103 (discussing CPSC's employment of voluntary standards). Indeed, Congress has set voluntary standards as a goal for such agencies. See 15 U.S.C. § 2056(b) (1988) (directing the CPSC to pursue voluntary standards when possible).

99 See, e.g., 29 Fed. Reg. 64-6585 to -6586 (1964) (concerning the FTC's focus on regulation of health and safety advertising, rather than health and safety generally).

100 To the extent a company has decided that it is in its corporate interest to produce an unsafe product, it is hard to see why that company would agree to a meaningful voluntary standard absent coercion. Many voluntary standards effectively are coerced by federal regulators or policy makers based on a threat of mandatory standards. See SMART GOVERNMENT, *supra* note 26. However, absent an ongoing and credible threat of regulation, companies may refuse to agree to such a standard. Alternatively, they might initially acquiesce but then fail to implement the new voluntary safety measures. For instance, after an upsurge in political interest in the possibility of regulating certain types of domestic firearms, the handgun industry adopted additional industry standards on childproofing handguns. See, e.g., *President, Handgun Makers Find Common Ground: Childproofing Triggers*, WASH. POST, Oct. 10, 1997, at A16 (noting White House ceremony announcing voluntary standard). After the threat of regulation receded, critics noted that the industry had failed to implement or to police those new standards. See, e.g., *DC Center Reports Gun Makers Not Installing Child-Safety Devices*, BOSTON GLOBE, Oct. 15, 1998, at A3.

101 Once again, the handgun industry provides a useful example. Firearms manufacturers have adopted industry standards, but few of the lower quality gun makers have agreed to adhere to these restrictions. In addition, the restrictions are not necessarily enforced. Finally, the standards in place are notoriously weak. For instance, it is well recognized in the handgun industry that a firearm should not discharge when dropped or jostled. See Larson, *supra* note 8. Yet, the voluntary industry standard only tests guns for drop safety in limited, unrealistic conditions and only checks for resistance

circumstances. They can be effective only if they attract a consumer's attention, provide a reasonable explanation of the risks and potential harms involved,¹⁰² and offer a way to use the product in an ordinary fashion without risk of harm.¹⁰³ Such conditions are difficult to fulfill, especially when the victims of product defects are children that cannot read warnings or third parties that are not even operating the defective product.¹⁰⁴ Solutions that require manufacturers to re-design defective products are not subject to these limitations. Fixing a defective product removes the risk of harm. That solution is far more effective than attempting to warn victims about harms they cannot readily avoid.

Thus, traditional solutions to consumer protection problems fail to provide an effective remedy to the defects in the consumer product safety superstructure. The remedy needs to be one that is currently available, provides the proper level of deterrence, and provides specific guidance to industry. It should set an objectively appropriate standard and provide for the expression of alternative viewpoints during the standard-setting process. As it happens, such a tool is currently available and can be utilized promptly to patch the product safety net.

II. Basis for Using UDAP Regulations To Patch the Product Safety Net

A. Introduction

The tool that can cure the current defects in the product safety net are state "Unfair or Deceptive Acts and Practices" statutes, known colloquially as UDAP. UDAP statutes, adopted by state legislatures across the country, are a relatively recent addition to the states' traditional police power arsenal. Most UDAP statutes were adopted between the mid-1960's and

to "jaroff" by releasing test guns from a mere one foot off the ground onto a rubber mat. See AMERICAN NAT'L STANDARD, VOLUNTARY INDUSTRY PERFORMANCE STANDARDS ¶¶ 5-7 (1990).

102 Warnings are useless if they do not make clear the extent of the danger. In one case, a manufacturer of a highly corrosive acid sold as a household cleaner argued that its generic warning, which was the same used on typical and traditional household cleaning products, was sufficient. See *DeHaan v. Whink Prods. Co.*, No. 91C0014, 1994 WL 24322, Jan. 26, 1994, at *5 (N.D. Ill.) (mem.). The consumer spilled a single drop of the fluid on herself and the hydrofluoric acid in the "cleaner" ripped up over three square feet of skin on her body. See *id.* at *3.

103 A warning that merely says that a good is dangerous is inadequate. If the consumer's only rational choice would be not to purchase the product if he or she knew of its dangers, then only those who fail to read the warning will buy the product. Indeed, this is exactly why tort law in many states has rejected the idea that a manufacturer can avoid the duty to design a safe product simply by issuing a warning. See, e.g., *Uloth v. City Tank Corp.*, 384 N.E.2d 1188 (Mass. 1978).

104 If a safety concern is at all complex, it may also be difficult to place a useful warning on the product itself unless the product is quite large. While a warning may be given in some detail on a lawn mower, there is little room for explanation on a handgun. Thus, for small products, the warnings are likely placed either in a manual, where subsequent users of the product will not see them, or carry so little content as to be almost pointless.

mid-1970's to parallel developments in consumer law at the federal level.¹⁰⁵ While some legislatures created their own operative text in these statutes,¹⁰⁶ most chose similar language drawn from "model" statutes, which made unlawful any "unfair or deceptive acts or practices in trade or commerce" and allowed for the state attorney general to obtain injunctions and penalties against violators.¹⁰⁷

State UDAP laws typically follow one of several model consumer protection statutes, including alternatives offered by (1) the uniform Unfair Trade Practices and Consumer Protection Law developed by the FTC and the Council on State Governments, (2) the Uniform Consumer Sales Practices Act offered by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, and (3) the Uniform Deceptive Trade Practices Act developed by the National Conference on Uniform Laws.¹⁰⁸ The model legislation generally is substantively similar to the unfairness provision in the Federal Trade Commission Act (FTC Act).¹⁰⁹ UDAP statutes do not attempt to define the contours of this broad directive.¹¹⁰ Instead, the meanings of unfairness and deception are to be developed over time, so that UDAP law can adapt to future business practices.¹¹¹ Similarly left unspecified by the statutes is the

105 See JONATHAN SHELDON & CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 1.1 (4th ed. 1997) [hereinafter UDAP]. Congress amended Section 5 of the Federal Trade Commission Act of 1938 to include unfair and deceptive acts and practices in commerce under the prohibition on unfair methods of competition in commerce. See 15 U.S.C. § 45(a)(1) (1988); EARL E. KINTNER & WILLIAM P. KRATZKE, 6 FEDERAL ANTITRUST LAW, § 43.14 to .15 (1986). All 50 states and the District of Columbia have enacted at least one statute barring unfair, deceptive, or unconscionable commercial conduct. See UDAP, *supra*, § 1.1.

106 See, e.g., OHIO REV. CODE ANN. § 1345.03 (Anderson 1993) (forbidding a supplier from committing an unconscionable act or practice in consumer transactions); OR. REV. STAT. § 646.605 to .641 (1995) (barring unconscionable tactics in connection with sales of goods or services); S.D. CODIFIED LAWS § 37-24 (Michie 1994) (barring knowing and intentional deceptive practices or omission of material fact in connection with sales of merchandise).

107 Nearly all UDAP statutes bar unfair or deceptive conduct in some form. See UDAP, *supra* note 105, app. A (cataloguing all state UDAP statutes, including the specific conduct prohibited under each state statute). Many states enumerate specific prohibited conduct, coupling this laundry list of specific prohibitions with a catch-all prohibition on unfair or deceptive conduct. See, e.g., 815 ILL. COMP. STAT. ANN. § 505/1 (West 1999) (prohibiting unfair or deceptive acts or practices, including 26 acts enumerated in the statute). Other state UDAP statutes bar unfair and deceptive conduct without listing examples. See UDAP, *supra* note 105, app. A (noting 14 states that list no specific prohibited acts). Many other statutes vary slightly the description of the prohibited conduct. See, e.g., ALASKA STAT. § 45.50.471(a) (Michie 2000) (barring unfair or unconscionable and unfair or deceptive acts or practices).

108 See UDAP, *supra* note 105, § 3.4.2 for a discussion of the uniform acts and their prevalence.

109 15 U.S.C. § 45(a)(1) (1988) ("Unfair or deceptive acts or practices in or affecting commerce are declared unlawful.").

110 However, as discussed *supra* note 107, several UDAP laws contain a non-exclusive list of commercial conduct that is prohibited. The conduct delineated in UDAP statutes often originated with one alternative of the model Unfair Trade Practices and Consumer Protection Law, which set forth 12 prohibited acts, such as bait and switch, failing to disclose that goods were used or altered, and misrepresenting a product's endorsement or geographic origin.

111 Several state courts interpreting UDAP statutes have held that the laws were designed to

role played by the state attorneys general in UDAP development. Although the majority of UDAP statutes specify some sort of rulemaking role for the attorney general,¹¹² the scope of this role was not immediately clear.¹¹³

Developments in conceptualizations of unfairness and the evolution of role of the state attorneys general in enforcing UDAP statutes have now reached a point where these statutes can provide coverage for consumer products not protected by the current safety framework. Based on the combined doctrines that (1) UDAP statutes can reach the sale of unsafe/unmerchantable products, and (2) an attorney general may issue substantive and detailed regulations addressing any commercial unfairness, UDAP provisions provide state attorneys general with the ability to bar the sale of unsafe and defective products. These two lines of UDAP development are reviewed below to demonstrate that their combination provides the best solution to the current product safety problem.

B. *UDAP Statutes Bar the Sale of Unsafe and Defective Products*

The first key development that turned UDAP into a solution for the current product safety problem was the expansion of "unfairness" to reach the sale of defective products. This evolution can best be seen by (1) reviewing the UDAP statutes, (2) surveying attempts to grapple with general definitions of unfairness, and finally, (3) looking at the strands of unfairness case law, which, taken together, bring unsafe and defective products within the UDAP purview.

1. Statutory Interpretation

While the actual text of a statute is the first place to start when attempting to divine its meaning,¹¹⁴ the language of the UDAP statutes provides limited direction in this regard. Aside from the non-exclusive

reach future business conduct. *See, e.g., Purity Supreme v. Attorney Gen.*, 407 N.E.2d 297, 303 (Mass. 1980) ("The purpose of an open-ended legislative use of the words 'unfair' and 'deceptive' was to allow for the regulation of future, as-yet-undevised business practices."); *see also Fletcher v. Don Foss of Cleveland, Inc.*, 628 N.E.2d 60 (Ohio Ct. App. 1993).

112 *See* UDAP, *supra* note 105, app. A (cataloging state UDAP statutes).

113 *See, e.g.,* MASS. GEN. LAWS ANN. ch. 93A, § 2(c) (West 1997) (authorizing the attorney general to make rules and regulations "interpreting the provisions" of the UDAP statute); UTAH CODE ANN. § 13-2-5 (1995) (authorizing rules to "administer and enforce" UDAP statute); *see also infra* note 114.

114 Legislative history also might generally be a useful tool in such an analysis, but it proves unhelpful in the present instance. UDAP statutes provide little useful direct legislative history. *See, e.g., Purity Supreme*, 407 N.E.2d at 303 ("[T]he legislative history of [UDAP] does not illuminate the issue before us; indeed, there is almost no published material which sheds light on the intent of the Legislature in passing [the statute]."); *Maine v. Ford Motor Co.*, 436 A.2d 866, 875 (Me. 1981); *see also generally* UDAP, *supra* note 105, § 3.4.2 ("State legislative history for a UDAP statute is often sparse.").

examples set forth in some state versions,¹¹⁵ UDAP generally does not identify the conduct that is “unfair.” However, to assume that the statutes themselves are completely unhelpful in showing why UDAP unfairness reaches the sale of defective goods would be a mistake. In fact, the language of UDAP provides several hints on how unfairness should be interpreted.

First, UDAP statutes are written in a broad fashion.¹¹⁶ This style of describing unfairness was not created from whole cloth by the UDAP model statute drafters but had far earlier origins. Congress eschewed limiting definitions in crafting the original “unfairness” provisions in the FTC Act, the federal precursor to UDAP.¹¹⁷ Given what Congress perceived as the never-ending inventiveness of unscrupulous businessmen, it decided that the FTC Act’s consumer unfairness provisions should be flexible, allowing the maximum latitude to its enforcers (the FTC and the United States Attorney General) and to the courts.¹¹⁸

There were also other reasons why UDAP statutes used such broad language. Trade law was seen as dependent in part on general community values regarding what was appropriate behavior in commercial activity,¹¹⁹ which the state legislatures realized changes over time.¹²⁰ Consequently, the use of broad language facilitated the evolution of the unfairness standard, which could then keep pace with consumer expectations and the

115 See UDAP, *supra* note 105, app. A.

116 See, e.g., *Kukui Nuts v. R. Baird & Co.*, 789 P.2d 501 (Haw. Ct. App. 1990) (stating that the legislature used broad language to create a flexible tool); *Lee v. Nationwide Cassel, L.P.*, 660 N.E.2d 94 (Ill. App. Ct. 1995) (giving the UDAP statutes a flexible definition); *Purity Supreme*, 407 N.E.2d at 303 (stating that the statute is designed to reach yet undevised practices); *Missouri ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) (noting that the UDAP law eschews specific definitions in order to give broad scope to the meaning and to prevent evasion because of overly meticulous definitions); *T & W Chevrolet v. Darvial*, 641 P.2d 1368 (Mont. 1982) (stating that the UDAP law is general in nature because it is difficult to list the areas covered); *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 816-17, 827 (Pa. 1974) (stating that the legislature used expansive provisions to halt unfairness, and the UDAP statute is not to be construed strictly like a penal statute).

117 See, e.g., *Monumental Properties*, 329 A.2d at 816-17, 827.

118 The Conference Report from 1914, when the FTC Act was addressed to “unfair methods of competition,” memorializes this legislative intent:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin all over again. If Congress were to adopt the method of definition, it would undertake an endless task.

H.R. CONF. REP. NO. 63-1142, at 19 (1914).

119 See, e.g., *Commonwealth v. DeCotis*, 316 N.E.2d 748, 754 (Mass. 1974) (stating that one duty of the enforcers of “unfairness” laws is “to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop”) (quoting *FTC v. Standard Educ. Soc.*, 86 F.2d 692, 696 (2d Cir. 1936), *rev’d on other grounds*, 302 U.S. 112 (1937)).

120 See, e.g., *Purity Supreme*, 407 N.E.2d at 303, 307 (holding that the standard is to evolve over time); *cf. Doliner v. Brown*, 489 N.E.2d 1036, 1040 (Mass. App. Ct. 1986) (extending unfairness to conduct that “elude[s] conventional definitions and categories”).

misleading advertisement in a newspaper, which could impact an array of potential customers, is actionable under even these more restrictive UDAP regimes.¹²⁸ Once again, presented with a choice on whether to craft a limited protection or a broad prophylactic one, the state legislatures chose the latter.¹²⁹

A broad interpretation of UDAP statutes is further supported by the fact that, although there are few explicit statutory limits to the unfairness doctrine, there are some. This indicates that legislatures were indeed crafting broad statutes purposefully, as they provided for outer boundaries. For instance, while the substantive reach of UDAP statutes is left open for future developments and interpretation, unfair acts or practices are barred only "in the conduct of trade or commerce."¹³⁰ This ensures that UDAP statutes are used only against commercial sellers, who are bound to the professional standards applied to professional tradesmen.¹³¹ UDAP statutes cannot be used as tools to alter the behavior of consumers or to address unfairness, however acute, in the private or noncommercial sphere.¹³² UDAP statutes also do not apply to business conduct that is approved or sanctioned by other administrative bodies.¹³³ Courts have also held that general principles of unfairness under UDAP statutes yield to other legislative goals when those goals are specifically implemented by other administrative agencies.¹³⁴ Moreover, UDAP statutes instruct state courts

128 See *People v. Empyre Inground Pools, Inc.*, 642 N.Y.S.2d 344 (N.Y. App. Div. 1996); *Haley Nursery Co. v. Forrest*, 381 S.E.2d 906 (S.C. 1989).

129 The choice is especially telling, because prior to 1938 the FTC Act did not contain this broad language. The absence of the term "acts or practices" in the FTC Act led at least one court to opine that the statute addressed only seller methods that were repeatedly and generally applied to the seller's customers. See *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 519 (6th Cir. 1944) ("[The FTC Act applicable to 1937 transactions] does not deal with specific acts claimed to be unfair, but with unlawful methods and practices in commerce. . . . The Commission could not prove a course of conduct for the period charged by picking out a few instances of isolated sales.") (citations omitted).

130 See, e.g., 15 U.S.C. § 45(a)(1) (1988); MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 1997).

131 See, e.g., *Heslin v. Connecticut Law Clinic*, 461 A.2d 938 (Conn. 1983) (holding that the UDAP law applied to attorneys); *Raymer v. Bay State Nat'l. Bank*, 424 N.E.2d 515 (Mass. 1981) (holding that the UDAP law applied to banks); *Cullen v. Inv. Strategies, Inc.*, 911 P.2d 936 (Or. Ct. App. 1996) (holding that the UDAP law applied to mortgage broker). See generally UDAP, *supra* note 105, §§ 2.1.4, 2.2.

132 See, e.g., *Nei v. Burley*, 446 N.E.2d 674 (Mass. 1983) (holding that a private seller of real estate is not subject to UDAP); *Wolverton v. Stanwood*, 563 P.2d 1203, 1204 (Or. 1977) (requiring that a UDAP claim arise out of transactions related to the defendant's "course of business, vocation or occupation"); see also UDAP, *supra* note 105, § 2.2.5.1.3 & nn.344-45 (cataloguing states where private sellers of homes are not subject to UDAP).

133 See, e.g., MASS. GEN. LAWS ANN. ch. 93A, § 3 (West 1997) ("[UDAP law shall not apply] to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the Commonwealth or of the United States."). See generally UDAP, *supra* note 105, § 2.3.3 (cataloging exemptions for regulated industries).

134 See, e.g., *Aurora Firefighter's Credit Union v. Harvey*, 516 N.E.2d 1028, 1034-35 (Ill. App. Ct. 1987) (exempting a practice from the UDAP law only if expressly authorized by another statute); *Attorney Gen. v. Diamond Mortgage Co.*, 327 N.W.2d 805, 808-09 (Mich. 1982) (holding that a licensing statute did not authorize the challenged activity). The mere fact that an area of commerce is

developing understanding of the responsibilities of commercial sellers.¹²¹ In addition, such broad language no doubt enabled states to adopt uniform statutory language without the need to tailor it to the specific needs of each state's subculture and ethos on consumer protection. The language was broad enough to be adopted nationwide, without restricting any one state to another's view of consumer rights.¹²²

A second statutory hint on how to interpret unfairness comes from the fact that UDAP statutes explicitly bar both unfair and deceptive practices.¹²³ The inclusion of both terms provides an important clue as to the meaning of unfairness. If unfairness reached only instances where the seller misled consumers, or where he failed to disclose certain important information, the use of both terms would be redundant.¹²⁴ Thus, even where consumers have perfect information and know exactly what sellers are doing, the statutes apply to prohibit conduct that is commercially unfair.¹²⁵

A third statutory hint for interpreting unfairness is that UDAP statutes specifically denote both acts and practices as bases for a violation, further emphasizing the breadth of the enactment. Not only are longstanding and ubiquitous practices the subject of scrutiny under UDAP statutes, but single instances of consumer mistreatment also can be actionable.¹²⁶

Some states incorporate a public interest component in their UDAP unfairness analysis, so that a single act, if applied only to a single consumer, would not be actionable.¹²⁷ However, placing a single

121 Case law indicates the evolving nature of the unfairness standard. See *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979); *Lee v. Nationwide Cassel, L.P.*, 660 N.E.2d 94 (Ill. App. Ct. 1995); *Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988); *Monumental Properties, Inc.*, 329 A.2d at 816-17, 827.

122 As a result, the consumer protection law in certain states occasionally strays considerably from the protections typically afforded. See, e.g., *Burdakin v. Hub Motor Co.*, 357 S.E.2d 839, 841 (Ga. Ct. App. 1987) (holding that the UDAP law did not apply to a repair shop's misrepresentation that a car had been repaired when it had not, because the misrepresentation affected only one consumer and not the consuming public generally).

123 See, e.g., *State v. U.S. Steel Corp.*, 919 P.2d 294, 312-13 (Haw. 1996) (discussing distinction between unfair and deceptive); *Cherick Distr., Inc. v. Polar Corp.*, 669 N.E.2d 218, 221 (Mass. App. Ct. 1996) ("Deception is only one prong of prohibited conduct under the UDAP law.").

124 See, e.g., *O'Neill*, 609 P.2d at 520 (holding that acts need not be deceptive to be unfair); *Normand Josef Enters. v. Connecticut Nat'l Bank*, 646 A.2d 1289, 1289 (Conn. 1994) (holding that one prong is enough to satisfy the UDAP law); *U.S. Steel*, 919 P.2d at 312-13; *Hylan v. Aquarian*, 372 A.2d 370 (N.J. Super. Ct. 1977).

125 See, e.g., *Weatherman v. Gary-Wheaton Bank*, 676 N.E.2d 206, 213-14 (Ill. App. Ct. 1996) (holding that a mortgage assignment fee, although disclosed, is unfair because it is not part of the buyer's transaction); *Commonwealth v. DeCotis*, 316 N.E.2d 748, 753 (Mass. 1974) (prohibiting as unfair a mandatory resale fee payable to mobile home park owner where owner performed no services for the fee, even though the resale fee requirement was disclosed to consumers in advance).

126 See, e.g., *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 71 Cal. Rptr. 2d 731, 742 (1998) (stating that 1992 amendments to the California UDAP law make it a violation to engage in even one unfair transaction).

127 See, e.g., *Burdakin v. Hub Motor Co.*, 357 S.E.2d 839, 841 (Ga. Ct. App. 1987) (a misrepresentation affecting only one consumer does not violate the UDAP law).

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to look to the meanings of unfairness used by the FTC and federal courts interpreting the FTC Act.¹³⁵ Although this last statutory directive is of limited value in the analysis of issues that have not been an area of FTC focus, such as product safety,¹³⁶ it demonstrates that legislatures adopting UDAP statutes had in mind some limiting parameters.¹³⁷ Had the legislatures intended to cabin the growth of the unfairness doctrine further, they knew how to do so.¹³⁸ The absence of further limitations can be seen as a sign that UDAP statutes should be interpreted expansively.¹³⁹

subject to potential regulation, or concerns an area related to an administrative body, does not preclude UDAP application. UDAP law is displaced only to the extent the administrative body specifically permits certain conduct under its authority. *See, e.g., DePasquale v. Ogden Suffolk Downs, Inc.*, 564 N.E.2d 584 (Mass. App. Ct. 1990).

135 *See, e.g., MASS. GEN. LAWS ANN.* ch. 93A, § 2(c) (West 1997) ("Such rules and regulations [promulgated by the attorney general] shall not be inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) [the FTC Act], as from time to time amended."). *See generally* UDAP, *supra* note 105, § 3.4.5.1, app. A (setting forth precedential value of FTC decisions for each state).

136 The FTC has generally eschewed pursuit of product safety, instead focusing its attention and resources on unfairness in advertising and informational issues. *See, e.g.,* 29 Fed. Reg. 8324 (1964) (noting the FTC's policy in this regard).

137 *See, e.g., State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 773 (Mass. 1974) (noting that Massachusetts courts are directed by the legislature to FTC precedent and the attorney general's regulations to interpret the UDAP statute).

The legislative history of state and federal UDAP laws provides little insight into the scope of the statutes. Most states lack any meaningful legislative history. While the FTC Act has a voluminous legislative history, the statute has been amended numerous times. The resulting history is a morass. However, there are at least some hints that Congress understood the unfairness doctrine to apply in the product safety arena. *See, e.g., EARL W. KINTNER, LEGISLATIVE HISTORY OF THE ANTITRUST LAWS AND RELATED STATUTES* 4897, 4981, 5126, 5132, 5143, 5155 (1983) (discussing references to defective products and shoddy goods during congressional debates on amendments to the FTC Act). Indeed, when it passed the Consumer Product Safety Act authorizing product safety regulations by the CPSC, Congress was aware that FTC adjudication under the FTC Act reached the sale of defective products. *See In re Chemway Corp.*, 78 F.T.C. 1250 (1971). Congress did not reject that interpretation of unfairness, although it did abandon the FTC's chosen methodology of case-by-case adjudication in that context. *See H.R. REP. NO. 92-1153*, at 24 (1972) ("Rather than propose individual legislation designed to deal with the product hazards . . . the Commission decided that the Federal Government should abandon its traditional case by case approach to product safety and consolidate in a single agency authority to regulate the full spectrum of products which are sold to or used by consumers."). There is also substantial support for the conclusion that Congress intended unfairness to be a growing, evolving concept that would apply to new issues in commercial trade as the conscience of the community required. *See, e.g., FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937). However, the mixture of quotations and commentary in the FTC Act legislative history ultimately sheds little insight into the purpose of the FTC Act and provides even less insight into the goals of the state enactments.

138 For instance, in a Massachusetts statute specifically devoted to stopping unfair practices by motor vehicle dealers, the Massachusetts legislature authorized regulation by the attorney general, but also specifically defines the unfair or deceptive acts at issue. *See MASS. GEN. LAWS ANN.* ch. 93B, § 3 (1997 West) (authorizing regulations by the attorney general), § 4 (defining the unfair and deceptive acts that are prohibited); *see also Reiter Oldsmobile, Inc. v. General Motors Corp.*, 393 N.E.2d 376, 376-78 (Mass. 1979).

139 Manufacturers seeking UDAP expansion will assert that the absence of express legislative permission to regulate a certain area of commerce indicates that this area is off limits. However, this argument ignores the broad language used in crafting UDAP laws. It also ignores well-established principles of administrative law governing the scope of statutorily delegated authority to

In summation, a review of the language employed in UDAP statutes at least shows that the unfairness doctrine was meant to be a broad and evolving one. From this starting point, the case law has provided more specific guidance on the scope and boundaries of the doctrine.

2. The Development of Overarching Definitions for Unfairness

Because state UDAP laws intentionally failed to define the acts or practices that are “unfair” or “deceptive,”¹⁴⁰ the task was left to courts and enforcement authorities.¹⁴¹ These entities have struggled to create a working definition of unfairness. The most generally cited of the proposed tests are the Supreme Court’s dicta in its 1972 opinion *FTC v. Sperry & Hutchinson*,¹⁴² and the definition set forth in what has come to be known as the FTC’s 1980 *Unfairness Statement*.¹⁴³

In oft-quoted language from the *Sperry & Hutchinson* opinion, the Supreme Court set forth three criteria for determining whether a practice is unfair:

- (1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).¹⁴⁴

Similarly, in a 1980 letter from the commissioners of the FTC to Senators Ford and Danforth, the ranking members of the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, the FTC sought to crystallize the essence of “unfairness”

regulate under a broad remedial statute. *See infra* notes 213-16 and accompanying text.

¹⁴⁰ *See supra* notes 116-18.

¹⁴¹ The task of defining is less difficult for deceptive than for unfair. Deceptive practices could be defined based on long-standing, detailed case law on the parameters of deception and fraud. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953). Interpretations of unfairness under UDAP statutes had to be made with far less guidance.

¹⁴² 405 U.S. 233 (1972).

¹⁴³ Federal Trade Commission Statement of Policy on Consumer Unfairness Jurisdiction (Dec. 17, 1980) [hereinafter 1980 Unfairness Statement], reprinted in Appendix to *In re Harvester*, 104 F.T.C. 949, 1070 (1984); *see also* 15 U.S.C. § 45(n) (codifying the 1980 *Unfairness Statement*).

¹⁴⁴ *Sperry & Hutchinson*, 405 U.S. at 244-45. Numerous state courts subsequently employed the so-called “S&H” standard in unfairness cases. *See, e.g.*, *State v. Grogan*, 628 P.2d 570 (Alaska 1981); *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980); *Han v. Yang*, 931 P.2d 604 (Haw. Ct. App. 1997); *Weatherman v. Gary-Wheaton Bank*, 676 N.E.2d 206 (Ill. App. Ct. 1996); *Ekl v. Knecht*, 585 N.E.2d 156 (Ill. App. Ct. 1991); *People ex rel. Hartigan v. Knecht Servs., Inc.*, 575 N.E.2d 1378 (Ill. App. Ct. 1991); *PMP Assocs., Inc. v. Globe Newspaper Co.*, 321 N.E.2d 915 (Mass. 1975); *See also* UDAP, *supra* note 105, § 4.3.3.4 & n.356 (cataloguing state courts that employ the S&H standard for unfairness).

in what is now commonly referred to as the *1980 Unfairness Statement*. The FTC stated:

To justify a finding of unfairness the [consumer] injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.¹⁴⁵

While certainly valiant efforts, the very language of the standards in *Sperry & Hutchinson* and the *1980 Unfairness Statement* disclose that their guidance is mainly ephemeral, and the definitions' generality provides little more than basic guideposts regarding the scope of unfairness.¹⁴⁶ As aptly put by the D.C. Circuit, "While the Commission's three-part unfairness standard sets forth an abstract definition of unfairness focusing on 'unjustified consumer injury,' it does little towards delineating the specific 'kinds' of practices or consumer injuries which it encompasses."¹⁴⁷ In the end, development of the meaning of unfairness under UDAP statutes was left to the fact-specific application of the doctrine¹⁴⁸ by the state courts.¹⁴⁹

145 1980 Unfairness Statement, *supra* note 143, at 36. In 1994, Congress codified the *1980 Unfairness Statement* as the official definition to be used by the FTC in pursuing federal unfairness cases. See The Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, § 9 (codified at 15 U.S.C. § 45(n) (1994)). States have not been particularly receptive to this statement of principles. See, e.g., *Bryant v. Sears*, 617 So.2d 1191, 1196 (La. Ct. App. 1993); *Legg v. Castruccio*, 642 A.2d 906 (Md. Ct. Spec. App. 1994); *State v. International Collection Serv., Inc.*, 594 A.2d 426 (Vt. 1991); see also UDAP, *supra* note 105, § 4.3.3.

146 See, e.g., *American Fin. Servs. Assn. v. FTC*, 767 F.2d 957, 971-72 (D.C. Cir. 1985) (discussing the FTC unfairness test's limited utility).

147 *Id.* at 972; see also *id.* ("Thus despite the Policy Statement's purpose of providing greater certainty in application of the unfairness doctrine, it falls short of providing any concrete guidance to the court in resolving the issues raised by petitioners in this case.").

148 See *id.*; *Commonwealth v. DeCotis*, 316 N.E.2d 748, 754 (Mass. 1974) (explaining that a "definition of what is unfair" is to develop through the "gradual process of judicial inclusion and exclusion"). In interpreting the fact-specific UDAP case law, it is important to remember that states have developed UDAP law at varying paces. The importance of consumer protection in a state's common law, the presence of a large litigious private bar or an aggressive public enforcer, and the existence of alternative effective state law remedies all play a role in how far the state's UDAP law has progressed or evolved. Because unfairness is an evolving concept, it may well be that states with less developed case law will need to proceed through intermediate levels of consumer protection already traveled by more "advanced" states before reaching the same conclusions. It may also be that local custom and the generally accepted balance between consumer rights and business freedom, which are bountiful sources for the presuppositions that form UDAP law, will cause certain states to take a different developmental path. Given the similarity of the statutes, however, and the state court tradition of giving deference to decisions of other states' courts in interpreting UDAP statute provisions, it is anticipated that most states will follow the lead taken by the more advanced jurisdictions. See, e.g., *Normand Josef Enters. v. Connecticut Nat'l Bank*, 646 A.2d 1289, 1306 (Conn. 1994). In order to better explain both the current status of the law, and to acknowledge the evolutionary steps that led there, the following Section addresses certain foundation UDAP unfairness case law developments and then focuses on the adjudged principles of unfairness that demonstrate the applicability of UDAP

3. Strands of Unfairness Case Law

a. Early Case Law Development: Precursor to the Relevant Principles of Unfairness

For many years, UDAP unfairness cases focused mainly on issues of consumer information and disclosure. Following guidance from the FTC and their own case law on fraud and misrepresentation, state courts held that deceptive conduct, such as bait-and-switch advertising or false claims regarding product quality, was unfair and civilly prosecuted such practices under both the deception and unfairness UDAP prongs.¹⁵⁰

However, as use of these state UDAP statutes matured and proliferated, state courts began to venture into less well-charted territory,¹⁵¹ addressing a litany of factual scenarios that had not been reviewed by federal authorities. In many such instances, the defendant seller had made complete disclosure,¹⁵² but state courts were nonetheless uncomfortable with the seller's behavior. Instances where sellers imposed fees without performing any service,¹⁵³ where sellers took advantage of the weak bargaining position of purchasers,¹⁵⁴ or even where they mistreated a

statutes to defective products.

149 UDAP statutes' unfairness development did look to their federal counterpart, the FTC Act, for guidance, but due to the much greater number of suits brought under the state UDAP laws, which contain a private right of action that the FTC Act lacks, as well as the FTC's limited enforcement priorities, applications of unfairness to innovative and novel situations were often first performed by state courts (and to a lesser extent by federal courts applying state law in diversity or pendant claims) in state UDAP cases. *See infra* Part II.B.3.b.

150 *See, e.g.,* *Young v. Joyce*, 351 A.2d 857 (Del. 1975); *Greenbriar Dodge, Inc. v. May*, 273 S.E.2d 186, 188-89 (Ga. Ct. App. 1980); *Attaway v. Tom's Sales, Inc.*, 242 S.E.2d 740, 741-42 (Ga. Ct. App. 1978); *Brown v. Lyons*, 332 N.E.2d 380, 386 (Cty. Ct. Ohio 1974).

151 *See, e.g.,* *State v. U.S. Steel Corp.*, 919 P.2d 294, 312-13 (Haw. 1996).

152 *See, e.g.,* *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985); *Weatherman v. Gary-Wheaton Bank*, 676 N.E.2d 206 (Ill. App. Ct. 1996); *DeCotis*, 316 N.E.2d at 753-54.

153 *See Weatherman*, 676 N.E.2d at 206; *DeCotis*, 316 N.E.2d at 753-54.

154 *See, e.g.,* *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979) (holding that unconscionability under the UDAP statute considers whether consumers are economically disadvantaged); *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971) (holding that unconscionability is most important when dealing with poor, uneducated consumers); *Miller v. American Family Publishers*, 663 A.2d 643 (N.J. Super. Ct. Ch. Div. 1995) (concluding that the purpose of the unconscionability provision is to establish a broad business ethic, and that the law implies good faith, honesty and fair dealing); *Wisconsin v. Fonk's Mobile Home Park & Sales, Inc.*, 343 N.W.2d 820 (Wis. Ct. App. 1983) (concluding that it is unfair to exploit the weak bargaining position of a tenant in a mobile home park). A few UDAP statutes also address this issue directly. *See, e.g.,* IDAHO CODE § 48-601 (1999) (a determination of unconscionability takes into account the vulnerability of the consumer group, very high prices, one-sided agreements, and whether conduct outrages or offends the public conscience); N.M. STAT. ANN. § 57-12-2 (Michie 1998) (defining an "unconscionable practice" as one that takes advantage of a disparity in knowledge to a grossly unfair degree or results in a gross disparity between value received and price paid).

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consumer's property in an effort to secure additional repair business¹⁵⁵ were all found unfair by state courts under UDAP provisions, despite the absence of deception.

Over time, unfairness was even more broadly applied to business conduct in more advanced UDAP states. A variety of merchant practices, so long as they involved commercial trade, were barred because they no longer matched the sensibilities of the community at large. Sexual and racial harassment attached to a commercial transaction,¹⁵⁶ misappropriation of intangible business property,¹⁵⁷ tortious interference with contract,¹⁵⁸ the charging of unconscionably high fees,¹⁵⁹ and the taking of steps that disadvantaged one's customer in order to gain a business advantage¹⁶⁰ were all adjudged unfair under current commercial mores. Courts began to acknowledge a broader UDAP purview and note that unfairness applied to a wide variety of commercial situations.¹⁶¹

b. Advanced Principles of Unfairness and Their Application to Product Safety

Beyond these basic developments in unfairness law, state courts, through fact-specific adjudication, eventually developed additional basic principles of unfairness. While none attempt to provide an overarching theory for unfairness doctrine like that reached for in *Sperry & Hutchinson* and the 1980 *Unfairness Statement*, they were at least successful in providing practical guidance on the application of UDAP statutes to various classes of conduct. Moreover, when certain of these principles are taken together, they create an unfairness lexicon that clearly includes within its scope the sale of defective and unsafe goods.

Each such relevant case law principle is discussed below. Following a description of the principles, we note how their combination brings defective and unsafe products within the unfairness rubric.

155 See, e.g., *State v. Grogan*, 628 P.2d 570 (Alaska 1981).

156 See, e.g., *Haddad v. Gonzalez*, 576 N.E.2d 658, 667-67 (Mass. 1991) (holding that the intentional infliction of emotional distress, including sexual harassment, by a landlord can violate UDAP); *Ellis v. Safety Ins. Co.*, 672 N.E.2d 979, 986 (Mass. App. Ct. 1996).

157 See, e.g., *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 684 F. Supp. 1138, 1143 (D. Mass. 1988).

158 See, e.g., *Anthony's Pier Four, Inc. v. HBC Assocs.*, 583 N.E.2d 806, 822-23 (Mass. 1991).

159 See, e.g., *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192 (D. Mass. 1998).

160 See, e.g., *Raymer v. Bay State Nat'l Bank*, 424 N.E.2d 515 (Mass. 1981) (holding that the bank wrongfully dishonored a check in order to maintain money in the customer's account for payment of the customer's debt to the bank).

161 See, e.g., *Larsen v. Larsen*, 656 A.2d 1009 (Conn. 1995) (holding that the UDAP law applies to a broad spectrum of activity); *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979) (holding that the UDAP law extends beyond common law and conduct prohibited by statute).

(i) Implied Warranty as a Basis for Unfairness

UDAP statutes generally have been applied to redress unfair sales that leave consumers dissatisfied. For instance, UDAP statutes and case law have long prohibited the sale of counterfeit goods, goods that are of substantially lower value than they appear to be, and goods simply not fit for their touted purpose.¹⁶² Because most of these sales involved not only shortcomings of the goods sold but also dealer misrepresentations used to consummate the sales, UDAP analysis in these cases typically focused on deception.¹⁶³ In many such instances, no overt misrepresentation was present, but the courts declared the sales unfair nonetheless because of the lack of relevant disclosures.¹⁶⁴ Indeed, even when the core problem with the sale was a defective product rather than misinformation, courts often tied the "unfairness" back to disclosure issues.¹⁶⁵

This reliance on deception to render unlawful the sale of defective goods is not possible where no issue of misinformation is present. However, during the last decade, courts increasingly have addressed such unfairness without relying on the disclosure doctrine. Drawing on earlier UDAP cases that held sellers to a standard of equitable behavior regardless of the knowledge of the purchaser,¹⁶⁶ courts have held that the sale of a sub-merchantable good is by itself an unfair practice.¹⁶⁷

162 Many of the UDAP statutes that include a laundry list of prohibited conduct expressly bar, for example, representing that goods or services offer certain characteristics, uses, or benefits that they do not. *See, e.g.*, ALASKA STAT. § 45.50.471(b)(4), (6) (Michie 1998); N.M. STAT. ANN. § 57-12-2 (Michie 1998); OHIO REV. CODE ANN. § 1345.02(A) (Anderson 1993). Such conduct is barred in other states as a result of attorney general regulation or litigation. *See, e.g.*, UDAP, *supra* note 105, §§ 4.7.1-.10 (discussing common misrepresentations prohibited by most states' UDAP law, including misrepresenting product characteristics, uniqueness, quality, safety, method of manufacture, place of origin, or endorsement).

163 *See, for example, Rosa v. Johnston*, 651 P.2d 1228 (Haw. Ct. App. 1982), where a UDAP violation was found when a solar water heater did not work. Although the court indicated that a heater that failed to work violated the UDAP law, the decision is based on deceptive practices, because the defendant's brochure promised high quality, which it failed to deliver. *See id.*; *see also Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293 (D. Minn. 1988) (finding a UDAP statute violation based on an unsafe IUD, but stating that a violation also could be framed as nondisclosure/failure to warn, because the plaintiff never received warnings or instructions and relied on doctor's statements regarding the safety of the IUD); *People ex rel. Hartigan v. Knecht Services, Inc.*, 575 N.E.2d 1378 (Ill. App. Ct. 1991) (holding that although shoddy services formed the basis for the claim, defendants also misrepresented qualifications and licensing of workers).

164 *See, e.g., Kociemba*, 680 F. Supp. at 1293.

165 *See, e.g., Kociemba*, 680 F. Supp. at 1293; *Rosa*, 651 P.2d at 1228; *Hartigan* 575 N.E.2d at 1378; *Church of the Nativity of our Lord v. WatPro, Inc.*, 491 N.W.2d 1 (Minn. 1992); *Eager v. Siwek Lumber & Millwork, Inc.*, 392 N.W.2d 691 (Minn. Ct. App. 1986); *New Mea Constr. Corp. v. Harper*, 497 A.2d 534 (N.J. Super. Ct. App. Div. 1985).

166 *See supra* note 152.

167 *See, e.g., Pomianowski v. Merle Norman Cosmetics*, 507 F. Supp. 435 (S.D. Ohio 1980) (holding that personal injury from a defective product can yield UDAP liability); *Paces Ferry Dodge, Inc. v. Thomas*, 331 S.E.2d 4 (Ga. Ct. App. 1985) (concluding that the sale of a defective car violates the UDAP law); *Bott v. Sterling Homes, Inc.*, 527 So. 2d 548 (La. Ct. App. 1988) (holding that where a mobile home was defective and in violation of federal mobile home manufacturing standards, the

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The underlying basis for these holdings stemmed from a developing public policy that consumers should be more substantively protected from unscrupulous sellers. This policy, reflected in other case law, mandates that commercial sellers have a duty to ensure that their products work and provide value to consumers.¹⁶⁸ The burden is appropriately placed on the commercial seller to ensure that the items are fit for their intended purpose.¹⁶⁹ While in no sense abandoning the UDAP requirement that consumers be provided with necessary information, this policy simply recognizes that consumers may not always be able to assimilate such information and that there is no purpose served by allowing commercial sellers to clutter the market with nonfunctional items that would only be bought by unsuspecting customers.¹⁷⁰

The public policy that commercial sellers should sell only goods of merchantable quality also is reflected by the Uniform Commercial Code. Section 2-314 of the UCC prohibits merchants from selling goods that are unfit "for the ordinary purpose for which such goods are used."¹⁷¹ In many states, this is an absolute prohibition, which cannot be disclaimed by the merchant in normal market circumstances.¹⁷² Under UDAP case law, the implied warranty of merchantability has been implemented in a variety of commercial settings, including some beyond the statutory scope of the UCC's implied warranty. UDAP cases have found it unfair for

UDAP law was violated); *State v. Therrien*, 633 A.2d 272 (Vt. 1993) (noting in dicta the lower court's finding of a UDAP law violation based on the sale of defective development that had not complied with permit process). The West Virginia UDAP statute defines merchantability and refers to federal and state quality and safety standards and "good working order." W. VA. CODE § 46A-6-102 (1999). This merchantability definition also includes all UCC warranties. *See id.*

168 *See, e.g., Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1330 (Mass. 1997) ("[S]ocial policy, advanced by breach of warranty theory, [holds] sellers liable for the quality and safety of their products.").

169 *See, e.g., Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967) (holding that the entire purpose behind the implied warranty section of the UCC is to hold sellers responsible when inferior goods are passed along to unsuspecting buyers); *Johnson Insulation*, 682 N.E.2d at 1330.

170 *See Vlases*, 377 F.2d at 846; *Johnson Insulation*, 682 N.E.2d at 1330. The policy also recognizes that third party users may also be harmed by the defective products and also categorically have no opportunity to assimilate product information. *See Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1355 (1989) (noting that a third-party user "generally had neither the bargaining power nor the opportunity to bargain with its manufacturer or seller and so could not provide himself with the same kind of protection that a purchaser of goods could").

171 *See, e.g., MASS. GEN. LAWS ANN. ch. 106, § 2-314(2)(c)* (West 1997) ("Goods to be merchantable must [be] . . . fit for the ordinary purposes for which such goods are used."); *see also U.C.C. § 2-315* ("Where seller . . . has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.").

172 *See, e.g., MASS. GEN. LAWS ANN. ch. 106, § 2-316A* (West 1997) (noting that in sales of consumer goods or services, any attempt by a seller or manufacturer of consumer goods and services to "exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable"); W.VA. CODE § 46A-6-107 (1999) (noting that one cannot exclude, modify, or attempt to limit any warranty, express or implied, including merchantability and fitness).

professionals to sell shoddy fixtures,¹⁷³ defective realty,¹⁷⁴ negligent services,¹⁷⁵ and intangible merchandise of questionable value.¹⁷⁶

Thus, it is the policy, not the UCC provision, that underlies the basis for finding unfairness in this area. The UCC is simply one manifestation of this public policy, just as the barring of sales not reached by the UCC via UDAP statute is another. UDAP cases also apply the unfairness doctrine to situations where UCC technicalities, such as privity, are not met.¹⁷⁷ Sales of defective cars, mobile homes, machinery, and building materials have all been held to be unfair under state UDAP statutes.¹⁷⁸ Although some

173 See, e.g., *Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 653 F. Supp. 927, 932 (D. Mass. 1987).

174 See *Krawiec v. Blake Manor Dev. Co.*, 602 A.2d 1062 (Conn. App. Ct. 1991) (concluding that the sale of a defective house violated the UDAP statute). One closely related area where state UDAP law routinely has been applied is the sale or lease of residential property that does not satisfy the implied warranty of habitability. See, e.g., *In re Cohen*, 185 B.R. 180 (Bankr. D.N.J. 1995); *Nielsen v. Wisniewski*, 628 A.2d 25 (Conn. App. Ct. 1993); *Hoke v. Beck*, 587 N.E.2d 4 (Ill. App. Ct. 1992); *Golt v. Phillips*, 517 A.2d 328 (Md. 1986); *State v. Weller*, 327 N.W.2d 172 (Wis. Ct. App. 1982). But see *Bisson v. Ward*, 628 A.2d 1256 (Vt. 1993) (holding that a habitability claim is "distinct" from the UDAP law).

175 See, e.g., *Reisman v. KPMG Peat Marwick*, 965 F. Supp. 165, 175-76 (D. Mass. 1997) (concerning accounting services); *People ex rel. Hartigan v. Knecht Services, Inc.*, 575 N.E.2d 1378 (Ill. Ct. App. 1991) (regarding shoddy construction services); *MacGillivray v. W. Dana Bartlett Ins. Agency of Lexington, Inc.*, 436 N.E.2d 964, 969-70 (Mass. App. Ct. 1982) (addressing insurance brokerage services); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454 (N.J. 1994) (concerning failure by the contractor to get permits, which allowed sloppy work that could not be checked by government inspectors); *R. Wilson Plumbing & Heating, Inc. v. Wademan*, 588 A.2d 444 (N.J. Super. Ct. App. Div. 1991) (regarding shoddy plumbing work); *Brown v. Lyons*, 332 N.E.2d 380 (Ohio 1974) (concerning incompetence); *Jaquith v. Ferris*, 669 P.2d 334 (Or. 1983) (implying that poor service in creating an earnest agreement violated the UDAP law).

176 See, e.g., *United Cos. Lending Co. v. Sergeant*, 20 F. Supp. 2d 192 (D. Mass. 1998) (holding that it is unfair to sell high point loans); cf. *American Fin. Servs. v. FTC*, 767 F.2d 957, 989 (D.C. Cir. 1985) (upholding an FTC rule barring loan terms that create a nonpurchase money security interest); *Arthur Murray Studio, Inc. v. FTC*, 458 F.2d 622, 626 (5th Cir. 1972) (enforcing under a federal unfair practices statute an FTC order limiting the length and size of dance instruction contracts).

177 Most state courts have not restricted UDAP recovery for breach of warranty and otherwise to those in privity with the seller. See, e.g., *Utah v. B&H Auto*, 701 F. Supp. 201 (D. Utah 1988); *Larsen v. Larsen*, 656 A.2d 1009 (Conn. 1995); *Warren v. LeMay*, 491 N.E.2d 464 (Ill. App. Ct. 1986); *Morris v. Osmose Wood Preserving*, 667 A.2d 624 (Md. 1995); *Levy v. Edmund Buick-Pontiac, Ltd.*, 637 A.2d 600 (N.J. Super. Ct. Law Div. 1993); *Perth Amboy Iron Works, Inc. v. American Home Assurance Co.*, 543 A.2d 1020 (N.J. Super. Ct. App. Div. 1988); *State v. GAF Corp.*, 760 P.2d 310 (Utah 1988). But see *Simpson v. Smith*, 517 N.E.2d 276 (Ohio 1987) (holding that some privity of contract, even minimal, is required under the UDAP law); see also GA. CODE ANN. § 10-1-391 (1997) (holding manufacturers strictly liable for damages assessed against retailers that carried their products, where manufacturers' "act or omission, whether negligent or not, is the basis for [the UDAP suit]").

178 See, e.g., *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293 (D. Minn. 1988); *Pomianowski v. Merle Norman Cosmetics*, 507 F. Supp. 435 (S.D. Ohio 1980); *Paces Ferry Dodge, Inc. v. Thomas*, 331 S.E.2d 4 (Ga. Ct. App. 1985); *Rosa v. Johnston*, 651 P.2d 1228 (Haw. Ct. App. 1982); see also UDAP, *supra* note 105, § 5.2.7.1 & n.534 ("A majority of courts find it is a state UDAP violation to fail to comply with offered or implied warranties."). Texas case law also specifically addressed unmerchantable goods as a UDAP law violation, when it held the sale of a defective shotgun to be a UDAP violation. See *International Armament Corp. v. King*, 686 S.W.2d 595, 599 (Tex. 1985). However, the Texas UDAP statute at that time was unusual in that it explicitly

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states have not yet reached the issue, and others have only adopted it with qualifications,¹⁷⁹ leading UDAP case law supports the principle that professional sellers must sell goods that work properly.

(ii) Failure To Protect Customers From Unnecessary Dangers as Basis for Unfairness

Another unfairness principle developed by state courts is that sellers may not place their customers in harm's way unnecessarily.¹⁸⁰ This principle developed in conjunction with state tort law, holding that professional sellers have a duty to protect consumers from dangers posed by their products.¹⁸¹ While this responsibility is absolute in some circumstances (with strict liability applied),¹⁸² and relative in others (such as instances where manufacturers are held only to a negligent design, manufacture, or distribution standard),¹⁸³ it reflects a general policy consensus that the seller is in a better position than the purchaser to address potential dangers.¹⁸⁴

This duty is not satisfied merely by warning consumers of the danger. The seller must take steps to eliminate the potential harm to the consumer by fixing the product.¹⁸⁵ For example, in *Uloth v. City Tank Corp.*, the Massachusetts Supreme Judicial Court held that the effectiveness of warnings must be balanced against the manufacturer's ability to

provided that any breach of implied warranty violated the statute. *See id.*

179 *See, e.g., In re Clark*, 96 B.R. 569, 582 (Bankr. E.D. Pa. 1989) (concluding that not every implied warranty breach is a UDAP violation); *Emick v. Koch*, 739 P.2d 947 (Mont. 1987) (finding no UDAP law violation where the defect in a truck did not render it inoperable); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454 (N.J. 1994) (holding that a defect is unfair, but not unconscionable, without aggravating circumstances); *see also* UDAP, *supra* note 105, at § 5.2.7.2 & nn.536-37 ("A significant minority of cases, however, hold that a breach of warranty is not automatically an unfair or deceptive practice.").

180 *See, e.g., Pomianowski*, 507 F. Supp. at 435 (holding that personal injury from a defective product can yield UDAP law liability); *Whelihan v. Markowski*, 638 N.E.2d 927 (Mass. App. Ct. 1994) (concluding that a landlord's lease of premises with unsafe plate glass constituted an unfair act in violation of the UDAP statute); *cf. Cox*, 647 A.2d at 454 (N.J. 1994) (holding that a defect is unfair, but not unconscionable without aggravating circumstances).

181 *See, e.g., Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1330 (Mass. 1997); *Zaza v. Marques & Nell, Inc.*, 675 A.2d 620 (N.J. 1996) (noting manufacturer's duty to make safe products and to include safety mechanisms and determining that manufacturer cannot rely on someone downstream to ensure safety of goods).

182 *See, e.g., Greenman v. Yuba Power Prods., Inc.*, 27 Cal. Rptr. 697 (1963); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

183 *See, e.g., Thibault v. Sears Roebuck & Co.*, 395 A.2d 843 (N.H. 1978); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 585 (Tex. App. 1996).

184 *See, e.g., Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978) ("We think that in such a case the burden to prevent needless injury is best placed on the designer or manufacturer rather than on the individual user of the product.").

185 *See* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. J (1965) ("When a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safe design is required over a warning that leaves a significant residuum of such risks.").

"anticipate and protect against possible injuries."¹⁸⁶ The court in *Uloth* stated that warnings did not protect a garbage truck manufacturer from liability where it could have made the product safer, holding that:

If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury. We think that in such a case the burden to prevent needless injury is best placed on the designer or manufacturer rather than on the individual user of the product.¹⁸⁷

State courts have incorporated this common law duty into UDAP law. For example, in *Whelihan v. Markowski*, a landlord that replaced a screen door in his building with plate glass, causing a tenant to severely injure her arm, violated his duty to that tenant and committed an unfair practice.¹⁸⁸ As found by the state court in that case, "the property manager consciously chose to disregard the immediate and direct risk to the plaintiff's physical safety. Such conduct not only constitutes a willful or knowing violation of [UDAP], it is conduct which is sufficiently egregious to justify treble damages."¹⁸⁹ Although the seller in *Whelihan* was also a landlord, and thus may have had additional responsibilities to the consumer, the reasoning in *Whelihan* applies to merchants and purchasers of other goods.¹⁹⁰ The duties of manufacturers to sell safe products, derived from state tort law, also square well with parallel FTC unfairness actions regarding the sale of products that pose unreasonable dangers to consumers.¹⁹¹

186 384 N.E.2d at 1192.

187 *Id.*; see also *Sturm Ruger & Co. v. Day*, 594 P.2d 38, 44 (Alaska 1979) ("[W]here the most stringent warning does not protect the public, the defect itself must be eliminated . . .").

188 638 N.E.2d at 928-29.

189 *Id.* at 929.

190 See *American Shooting Sports Council v. Attorney Gen.*, 711 N.E.2d 899, 904 (Mass. 1999) (noting that "the sale of products posing unforeseeable dangers constitutes conduct recognized as falling within the [UDAP law] prohibitions . . . and that breach of warranty constitutes an unfair or deceptive practice") (citations omitted); see also *Nielsen v. Wisniewski*, 628 A.2d 25 (Conn. App. Ct. 1993) (noting landlord's indifference to tenant and tenant's young children). This is particularly true where risks to children are involved. Both federal and state analyses of unfairness have often focused on the need to protect the unthinking, the unsuspecting, and the credulous, as well as the sophisticated. See, e.g., *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979). Thus, potential harms to children can be an important factor in determining the unfairness of certain conduct. See, e.g., *FTC v. R.F. Keppel Bros.*, 91 U.S. 304 (1934); *In re Audio Communications, Inc.*, 114 F.T.C. 414 (1991) (holding that disclosure is not sufficient if conduct is targeted toward minors); *In re Teleline*, 114 F.T.C. 399 (1991) (same).

191 See, e.g., *In re Harvester*, 104 F.T.C. 949, 1073 app. (1984) (noting FTC position that "unwarranted health and safety risks may also support a finding of unfairness"); *In re Chemway Corp.*, 78 F.T.C. 1250 (1971) (barring the sale of toxic toothbrushes). The UDAP statutory requirement that sellers satisfy this tort-based duty is consistent with other UDAP cases noting that in a variety of circumstances it is unfair for a seller to breach duties owed to purchasers. See *supra* notes 168-84 and accompanying text.

(iii) Violations of Existing Laws as a Basis for Unfairness

The third relevant principle of unfairness developed by state courts has been that violations of existing laws also constitute violations of UDAP statutes. As reflected in the generalized unfairness description of *Sperry & Hutchinson*, violation of existing standards is one test for determining whether a practice is unfair.¹⁹² As is the case with the doctrine of per se negligence, courts assume that statutes, regulations, and bylaws provide a standard of conduct with which all reasonable merchants must conform.¹⁹³ The pre-existing laws already contain a minimum baseline for fair conduct, and failure to abide by these standards is automatically deemed a violation of established concepts of fairness.¹⁹⁴ The principle can also be looked at in two other ways: first, sellers have an implied duty to obey the law, and their failure to do so is a breach of that duty. As discussed previously, breaches of duties and obligations have long been held to be unfair under UDAP case law. Second, all sellers that obey the law compete on a level playing field. Those sellers that do not take precautions required by law or fail to make the investment needed to comply with statutory requirements not only sell goods that are legally substandard, but also avoid the expenses incurred by those merchants who fulfill their obligations. This gives lawbreakers an unfair competitive advantage.

Regardless of how the doctrine is analyzed, it is universally accepted in state UDAP law that the violation of at least certain types of statutes creates a prima facie case of unfairness.¹⁹⁵ While some jurisdictions

192 405 U.S. 233, 244-45 (1972).

193 See, e.g., *Kingston Square Tenants Ass'n. v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566 (S.D. Fla. 1992) (holding that an unfair act in leasing property does not substantially comply with the pertinent housing code or health code); *Lemelledo v. Beneficial Management Corp.*, 674 A.2d 582 (N.J. 1996) (holding that the Consumer Loan Act provides a standard for UDAP laws). In addition to statutory principles of unfairness, some UDAP laws also expressly incorporate long-standing judicial principles of unfairness, such as unconscionability. See, e.g., OHIO REV. CODE ANN. § 1345.03 (1993) ("No supplier shall commit an unconscionable act or practice in connection with a consumer transaction," taking into account the consumer's ability to protect himself and the inability of the consumer to get substantial benefit); OR. REV. STAT. § 646.605 (1999) (barring unconscionable tactics in connection with sales of goods or services); UTAH CODE ANN. § 13-11-5 (1995) (prohibiting unconscionable acts or practices).

194 See, e.g., *Daddona v. Liberty Mobile Home Sales, Inc.*, 550 A.2d 1061 (Conn. 1988) (holding that statutes constitute and reflect identifiable public policy, the violation of which runs afoul of the UDAP law); *Krawiec v. Blake Manor*, 602 A.2d 1062 (Conn. App. Ct. 1991) (citing a violation of identifiable public policy).

195 See, e.g., *State v. Grogan*, 628 P.2d 570 (Alaska 1981); *Lemelledo*, 674 A.2d at 582. This rule of unfairness also is incorporated in certain UDAP statutes. See FLA. STAT. § 501.201-203 (1994) (Definitions: "(3) Violation of this part includes violation of . . . c) any law, statute, rule or regulation which proscribes an unfair method of competition or unfair, deceptive or unconscionable acts . . ."); MASS. REGS. CODE tit. 940, § 3.16(3) (1999) (providing that any violation of a Massachusetts statute designed to protect the public health, safety or welfare is an unfair or deceptive act); see also *Sears Roebuck & Co. v. Gold & Sudalter*, 128 F.3d 10, 19 (1st Cir. 1997) (discussing a violation of the

currently apply the principle in a stricter fashion, all agree that statutes implemented to protect consumer health, safety, or welfare provide a baseline standard for fair and proper merchant conduct.¹⁹⁶ If a statute was enacted to protect consumers, whether by requiring certain features on products or by limiting the access of goods to certain types of persons, failure to follow the substantive requirements of the law can result in a UDAP violation.

Indeed, this is true even where the statute does not specifically apply to the seller at issue. So long as the UDAP statute sets the general standard for trade, sales by a specific seller not included for various technical reasons, may still be unfair.¹⁹⁷ This has been recognized in instances where retailers are forbidden from making certain sales under the UDAP statute, but wholesalers are not. In such circumstances, the wholesaler's failure to meet the standard can still violate the UDAP statute.¹⁹⁸ It is also unfair for commercial sellers to offer a good that can only be used for illegal purposes.¹⁹⁹ Given the prophylactic nature of UDAP statutes and their focus on preventing the development of unfair practices, extensions such as these are both prudent and expected. Where statutes already set guideposts for acceptable business behavior, failure by professional sellers to follow these standards will violate UDAP laws.²⁰⁰

ethical rule for attorneys as a basis for UDAP liability); *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 684 F. Supp. 1138 (D. Mass. 1988) (holding that a violation of federal rules regarding cable piracy violates UDAP). *But see People ex rel. Daley v. Grady*, 548 N.E.2d 764 (Ill. App. Ct. 1989) (holding that a violation of a licensing statute is not necessarily a UDAP law violation, because the legislature incorporated certain statutes.).

196 See, e.g., *Kingston Square*, 792 F. Supp. at 1575; *Winston Realty Inc. v. G.H.G., Inc.*, 331 S.E.2d 677 (N.C. 1985); *Gabriel v. O'Hara*, 534 A.2d 488, 494 & n.20 (Pa. Super. Ct. 1988). *But cf. TEX. BUS. & COM. CODE ANN.* art. 2, § 17.43 (West 1999) (stating that Texas rejects per se UDAP liability for statutory violations).

197 See, e.g., *Karst v. Goldberg*, 623 N.E.2d 1348 (Ohio Ct. App. 1993) (holding that the sale of a satellite dish with the knowledge of illegal use could violate the UDAP law even though the consumer, not the seller, would be violating the law); *Celebrezze v. United Research, Inc.*, 482 N.E.2d 1260 (Ohio Ct. App. 1984) (holding that a collection agency could not avoid liability because it assigned claims).

198 See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *American Shooting Sports Council v. Attorney Gen.*, 711 N.E.2d 899 (Mass. 1999).

199 See *Karst*, 623 N.E.2d 1348. Several of the above principles, relying on an express statutory prohibition as the basis for public policy to reach the conduct of persons beyond the explicit reach of the statute, are relevant to the municipality suits against gun manufacturers and sellers. Rather than simply seek to shut down gun sellers who peddle guns that are illegal in a given jurisdiction, the cities have sought to reach the manufacturers who allegedly conspire to flood restricted markets with illegal guns. See, e.g., *Ganim v. Smith & Wesson Corp.*, No. X06-CV-99-0153198S, 1999 WL 1241909 (Conn. Super. Ct.) (order dated Dec. 10, 1999) (dismissing Bridgeport suit).

200 Even if the UDAP law reached only the sellers that are specified in the substantive statutes, the question of whether a violation of law is also a violation of the UDAP law is not an irrelevant one. As a consumer protection tool, UDAP law is often far more effective than the enforcement mechanisms of other statutes. Non-UDAP statutes may entail heightened proof requirements, limited remedies, or procedural hurdles that do not hinder civil enforcement under UDAP law. UDAP laws offer an alternative enforcement mechanism, especially for criminal statutes that are enacted to protect consumers. See *Commonwealth v. DeCotis*, 316 N.E.2d 748 (Mass. 1974).

(iv) Tying Together the Advanced Principles of Unfairness

The three principles of unfairness, derived by state courts after considerable case-by-case adjudication of UDAP issues, each address somewhat different issues. The “implied warranty” principle concerns mainly the sale of shoddy items that do not work or at goods that fail to meet even minimum standards of trade. The “duty to protect” principle addresses the sale of unreasonably dangerous items. Finally, the “violation of law” principle reaffirms that merchants must follow existing legal standards, even if for practical or procedural reasons those standards are not explicitly enforceable against them. Each of these principles supports the application of UDAP statutes to the sale of unsafe consumer products. Below, we briefly analyze how each principle applies on its own and how together, the principles demonstrate that sales of unsafe consumer products are unfair under state law.

The application of the first principle, implied warranty, is rather straightforward. Cases decided under this principle show that it is unfair to sell goods that do not work properly and are not fit for the purpose for which they are generally used. Many unsafe product sales fall squarely within such parameters. Foremost are those goods that are unsafe when they fail to operate. Fire extinguishers, smoke alarms, firearms, and safety gear all stand as examples of consumer items that are most unsafe when they fail to perform when needed. Moreover, one can argue that the implied warranty principle also applies to goods that contain a defect or malfunction that poses a risk of harm. There are cases indicating that this risk of danger makes the goods unfit for the purpose for which they are generally used.²⁰¹

While the “implied warranty” principle provides clear application of UDAP to certain types of unsafe products (for instance, those that malfunction), arguably its application becomes less clear with respect to products that work but lack childproofing or other safety devices to guard against misuse. Here, the second relevant principle developed by state courts comes into play. As noted in Part II.B.3.b.(ii), sellers have a duty to prevent unnecessary risks of harm to their customers. As in *Whelihan v. Markowski*²⁰² and other tort decisions, a seller must make a reasonable effort to provide a safe product to his customers. So long as the seller is

Using UDAP law instead of a criminal statute, the attorney general can bring a preemptive, injunctive suit to stop unlawful conduct while it is still nascent. The attorney general also can prove his or her case by a preponderance of the evidence without having to show criminal law elements such as scienter. If the attorney general discovers the unfair practice well after it has begun, he or she can seek substantial penalties under the UDAP statute, which may offer a more substantial sanction than that afforded by the underlying criminal statute.

201 See, e.g., *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1330 (Mass. 1997).

202 638 N.E.2d 927 (Mass. App. Ct. 1994). *Whelihan* also is a “duty of law” case.

aware of the risks and can economically design around them, he is under an obligation to do so.²⁰³ While this principle might be of little use in the smoke detector/fire extinguisher case, it is directly on point for dangerous goods that fail to include basic safety devices.²⁰⁴ This is particularly true in the area of childproofing, where UDAP laws may impose a heightened burden on the seller.

Although the combination of the warranty and unreasonable danger principles cover much of the product safety arena, they are further supplemented by the third UDAP unfairness principle. In instances where factual issues remain concerning the safety of a device or where countervailing considerations make the reasonableness of product design debatable, existing statutes can provide guideposts as to appropriate commercial conduct. In some instances, states may already have statutory requirements in place relating to product safety.²⁰⁵ Although the nature of those statutes (or gaps in their coverage) may make it difficult to enforce them in a practicable way,²⁰⁶ they still provide substantive standards that can be enforced through UDAP statutes. Based on the third relevant unfairness principle, an attorney general can act to enforce these standards without having to rely on the existing two-tiered consumer product safety net. The third principle reaffirms the idea that UDAP statutes can be used to oversee product specifications whenever prospective standards have been properly established.

As developed by state courts under state UDAP laws, the three principles of unfairness noted above demonstrate that it is unfair for commercial merchants to sell unsafe or defective consumer goods. This UDAP development has critical implications for goods that escape effective federal CPSC regulation (i.e., by statutory exemption) and also fall into areas of lessened tort protection (products subject to public policy debate, products that require skill to handle, and complex products used in complex circumstances).²⁰⁷

However, these developments in the substantive scope of unfairness alone do not provide a way to patch the holes in the existing federal safety net. UDAP statutes, in their most traditional form, require case-by-case litigation. In such litigation, a UDAP claim against an unsafe product will

203 See *supra* notes 180-84.

204 It also bolsters the "implied warranty" principle, by providing a further basis for the concept that the sale of goods with harmful defects is unfair.

205 See, e.g., WIS. STAT. ANN. § 100.186 (West 1994) (limiting ways linseed oil products may be made).

206 For instance, the statutes might be criminal, thus entailing a rigorous level of proof and requiring intent. Alternatively, a statute might bar certain retail sales but not prevent wholesalers from providing errant retailers with the goods in question. The civil nature of UDAP laws and the ability of an attorney general to obtain injunctions based on UDAP law UDAP laws to make more effective use of these substantive standards than the statutory frameworks that include them.

207 See *supra* Part I.C.

be subject to many of the same vagaries, obstacles, and fortuitous circumstances as tort suits. However, if used in combination with another set of developments in UDAP administrative law, the unfairness doctrine provides a viable solution to the current product safety dilemma. By applying their broadly worded regulatory powers under UDAP statutes, state attorneys general can establish standards for products that fall through the federal safety net. This solution provides an approach that protects consumers, provides notice to businesses, and is acceptable to the courts.

C. *Attorney General UDAP Regulations as a Means To Implement Protections Against the Sale of Defective and Dangerous Goods*

The state statutory schemes designed to combat unfair and deceptive commercial conduct almost uniformly provide for both private remedies and government enforcement actions brought by state attorneys general.²⁰⁸ Twenty-seven states couple the attorney general's litigation authority with some specific reference to the attorney general's administrative authority to write rules or regulations under the UDAP statute.²⁰⁹ As noted in Part II.A, the meaning of these references has been in dispute, with some UDAP opponents arguing that the statutory language merely allows attorneys general to set standards for administration of UDAP statutes procedurally, to add structure to prosecutorial discretion, or to provide interpretive and nonbinding guidance to the business community.²¹⁰

In the twenty or more years since state legislatures authorized UDAP administrative rules, the courts have developed the role of regulations by the attorney general. This Section shows that, consistent with the development of administrative law principles over the same time, courts generally have held that an attorney general's regulatory power is substantive, not merely interpretive, and extends to detailed regulations setting forth standards for commercial conduct. This refinement of the role of UDAP regulations, coupled with the developments discussed above regarding the substantive reach of UDAP statutes, has opened the door for attorneys general to establish UDAP standards for product safety.

Typical UDAP statutes authorize the attorney general to promulgate "all rules and regulations necessary to implement and enforce this act"²¹¹

208 See UDAP, *supra* note 105, app. A (describing all fifty states' UDAP statutes, including government enforcement remedies).

209 See *id.*

210 See *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d at 303 (Mass. 1980) (noting similar industry arguments). Word choices by some legislatures may have encouraged such interpretations. See, e.g., UTAH CODE ANN. § 13-2-5 (1999) (authorizing rules to "administer and enforce" the UDAP statute).

211 W. VA. CODE § 46A-6-107 (1999) (noting that the Attorney General may adopt

or to issue regulations "interpreting" the UDAP act.²¹² Standing alone, the language of delegation does not clearly indicate a substantive role for UDAP regulations. For instance, these standard statutory delegations do not state whether attorney general regulations are to establish substantive rather than internal procedural standards or whether regulations may set forth detailed instead of generalized rules for commercial conduct. Thus, as with the meaning of "unfairness," case law developments played a key role in the delegation language of UDAP statutes.

The threshold question faced by courts regarding attorney general regulatory power was whether UDAP statutes authorized attorneys general to establish *substantive* standards in the first instance. Where UDAP statutes authorized rules necessary to "enforce" or "implement" the statute, persons seeking to avoid new regulations asked courts to limit rulemaking to internal procedural rules concerning attorney general enforcement.²¹³ This argument was urged in various fields through the 1970s, as new state and federal agencies were created to regulate certain areas of commerce.²¹⁴ By that time, the judiciary already had accepted administrative agencies as the so-called fourth branch of government, and it had made clear that the delegation of administrative authority could include quasi-legislative power to issue binding standards, far beyond the power simply to govern the agency's internal procedures.²¹⁵ In the UDAP context, courts facing such a challenge held that the state attorney general had quasi-legislative power reaching beyond procedural matters.²¹⁶

This reasoning applied even to UDAP statutes that only authorized

regulations necessary and proper to effectuate the purposes of the UDAP statute); see also R.I. GEN. LAWS § 6-13.1 to .7(c) (noting that the Attorney General may promulgate such rules and regulations as may be necessary).

212 MASS. GEN. LAWS ANN. ch. 93A, § 2(c) (1997); see also ALASKA STAT. § 45.50.491 (Michie 1998).

213 See, e.g., *United Consumers Club Inc., v. Attorney Gen.*, 456 N.E.2d 856 (Ill. App. Ct. 1983) (holding that the UDAP provision permits substantive rules, not merely procedural ones).

214 See CHARLES H. KOCH JR., *ADMINISTRATIVE LAW AND PRACTICE* §1.4 (2d ed. 1997) (discussing the 1970's expansion of "quality of life" administrative agencies and regulations). During that period, federal courts reaffirmed that Congress was permitted to delegate to administrative agencies the power to issue substantive, or "legislative," rules. See, e.g., *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973) (granting power sufficient to authorize substantive rulemaking); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) (granting substantive rulemaking authority to the FTC); see also *Ponderosa Ridge LLC v. Banner County*, 554 N.W.2d 151 (Neb. 1996) (permitting delegation of substantive rulemaking by state statute).

215 See *Bowsher v. Synar*, 478 U.S. 714, 757 (1986) ("[I]t is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power . . ."); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or are manifestly contrary to the statute.").

216 See e.g., *United Consumers Club v. Attorney Gen.*, 456 N.E.2d 856 (Ill. App. Ct. 1983); *Fenwick v. Kay Am. Jeep, Inc.*, 371 A.2d 13 (N.J. 1977).

the attorney general to promulgate guidelines "interpreting" the prohibition on unfair and deceptive acts and practices. Defendants subjected to new regulations contended that administrative "interpretations," by the plain meaning of the governing statutes, could only serve as guidelines, not prohibitions equivalent to law.²¹⁷ However, that argument fell prey to the general trend in administrative law holding that the power to "define" or "interpret" meant that such interpretations had the force and effect of law.²¹⁸ Landmark cases in Massachusetts and New Jersey, followed by other states, held that UDAP regulations were not merely instructive or interpretive, but could set the standards for unfairness.²¹⁹ Consequently, the violation of properly promulgated regulations constituted an unfair and deceptive act in violation of the UDAP statute, subjecting the wrongdoer to UDAP remedies.²²⁰

Once UDAP regulations were granted the force and effect of law, the next layer in the judicial interpretation of UDAP regulatory authority concerned the specificity of regulations—that is, whether UDAP statutes permitted explicit standards for a given area of business. The initial attorney general forays into rulemaking typically established merely general precepts of deception and unfairness. For instance, several state attorney generals promulgated regulations stating that the failure to disclose material information to customers was an unfair or deceptive act.²²¹ When regulators began reaching beyond general precepts to define specific prohibited conduct in particular areas, targets of regulation objected. Seizing on both the language of delegation and the general nature

217 See, e.g., *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297 (Mass. 1980); *Pet Dealers Ass'n v. Division of Consumer Affairs*, 373 A.2d 688 (N.J. Super. Ct. App. Div. 1977).

218 The Supreme Court has upheld the delegation of authority to administrative agencies to provide the details of what conduct is prohibited under the statute. See *Zenel v. Rusk*, 381 U.S. 1 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958); see also *United States v. Henry*, 136 F.3d 12, 16 (1st Cir. 1998) (upholding delegation whereby agency "defines" the meaning of hazardous waste).

219 See *Casielles v. Taylor*, 645 F.2d 498, 501 (1981) (violation of regulation per se violates act); *Purity Supreme*, 407 N.E.2d at 297; *Jiries v. BP Oil*, 682 A.2d 1241 (N.J. Super. Ct. Law Div. 1996); see also OR. REV. STAT. § 646.605 (1999) (making unlawful any unfair practice as defined by attorney general regulations); R.I. GEN. LAWS § 6-13.1-7(c) (1992) (stating that rules have force of law); *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566 (S.D. Fla. 1992) (holding that the law at issue was definitively interpreted by regulation). But see *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 363-65 (Minn. 1979) (interpreting legislative grant of rulemaking authority and holding that Consumer Services Commission's rules are interpretive only, without effect of law, and must be applied to specific facts in each case).

220 See, e.g., *Purity Supreme*, 407 N.E.2d at 297; *State v. Weller*, 327 N.W. 2d 172 (Wisc. Ct. App. 1982). This does not mean, of course, that UDAP violations exist only where a specific rule or regulation has been violated; administrative regulations are not the exclusive source of violations. See *Department of Legal Affairs v. Father & Son Moving & Storage Inc.*, 643 So.2d 22 (Fla. Dist. Ct. App. 1994).

221 See, e.g., MASS. REGS. CODE tit. 940, § 3.05 (1999) (prohibiting misrepresentations and failures to disclose material information to consumers). Other regulations commonly adopted by attorneys general govern door-to-door sales, bait and switch advertising, comparison price advertising, and refunds. See UDAP, *supra* note 105, app. A.

of UDAP statutes, which provide an open-ended prohibition rather than explicit standards for conduct, defendants argued that an attorney general could establish only regulations setting forth general principles, and that only the courts can apply such principles to specific courses of conduct.²²² Courts also rejected these efforts to restrict UDAP regulation, holding that UDAP regulations could identify specific unfair. As noted by one state supreme court: "The Attorney General is not constrained to propose abstract definitions of the words 'unfair' and 'deceptive;' rather, he is to identify particular business practices within their scope."²²³ This conclusion is consistent with the many UDAP statutes that codify specific conduct as unfair and deceptive in non-exclusive lists set forth in the statute.²²⁴

Indeed, courts made clear that the attorney general could investigate and determine standards for commercial conduct sua sponte and did not need to wait for a court to announce an unfairness principle. For instance, the Massachusetts Supreme Judicial Court specifically rejected the notion that "legally binding interpretations of 'unfair' and 'deceptive' must be made in the first instance by [the courts]."²²⁵ As envisioned by those twenty-seven statutes authorizing regulations, the attorney general is the judiciary's equal in developing and defining the prohibition on unfairness and deception contained in UDAP statutes.²²⁶

A final important development in UDAP regulatory jurisprudence involves the scope of the rulemaking authority. The key remaining question was whether state attorneys general could write specific

222 See e.g., *Purity Supreme*, 407 N.E.2d at 297.

223 *Id.* at 306; see also *Fenwick v. Kay AM. Jeep. Inc.*, 371 A.2d 13 (N.J. 1977); *Amato v. General Motors Corp.*, 463 N.E.2d 625 (Ohio Ct. App. 1982).

224 Some UDAP statutes expressly provide that the list of specific prohibited conduct is not exclusive. See, e.g., OHIO REV. CODE ANN. § 1345.02(B) (Anderson 1993). Other statutes have been so interpreted by the courts. See *Legg v. Castruccio*, 642 A.2d 906 (Md. Ct. Spec. App. 1994) (holding that list in the Maryland UDAP statute is not exhaustive). This open-ended approach towards rulemaking authority comports with the FTC's parallel, albeit somewhat more limited, regulatory authority under its own federal enabling legislation. See 15 U.S.C. § 57a (1994) (authorizing the FTC to prescribe both "(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . and B) rules which define with specificity acts or practices which are unfair or deceptive . . .").

225 *Purity Supreme*, 407 N.E.2d at 306.

226 See *Normand Josef Enters. v. Connecticut Nat'l Bank*, 646 A.2d 1289 (Conn. 1994) (holding that courts and the administrative body are on the same footing in developing a statute); *Luskin's, Inc. v. Consumer Protection Div.*, 657 A.2d 788 (Md. Ct. Spec. App. 1995) (holding that the Attorney General, through cease and desist orders, and the courts, have concurrent jurisdiction over UDAP law violations); *Slaney v. Westwood Auto Inc.*, 322 N.E.2d 768, 773 (Mass. 1975) (holding that the Attorney General's interpretation of the UDAP statute by regulation complements development through litigation in the courts). But see *Christie v. Dalmig, Inc.*, 396 A.2d 1385, 1388 (Vt. 1979) ("Merchants have a right to test, in a court of law, whether, in fact, warranties have been violated. This may cause injury to consumers but not through any unfairness, and it is only when unfairness is involved that the Act gives the Attorney General the authority to make rules and regulations relating to it.").

regulations addressing *any* area of unfairness, or whether the attorney general's authority was limited only to certain traditional types of unfair practices. The UDAP case law fully supports a broad application of the regulatory provisions. Wherever UDAP unfairness can reach, an attorney general may regulate.²²⁷ This conclusion comports with general principles of administrative law, which determine the scope of regulatory authority by reviewing the substance of the organic statute and its purpose.²²⁸

Further, the decision to enforce law through litigation or by substantive rulemaking is generally not governed by limitations in regulatory authority but, lies within the discretion of the administrative agency.²²⁹ UDAP statutes are undeniably, and purposefully,²³⁰ broad and flexible in scope,²³¹ and the delegations of regulatory authority in those statutes are similarly broad.²³²

The conclusion is also reasonable from a policy perspective. A broad delegation of regulatory authority permits an agency to define more precisely by regulation the nature of the prohibited conduct.²³³ Through delegation, legislatures recognize "the necessity of administrative flexibility to prevent the abuses which the [statute] seeks to remedy."²³⁴

Indeed, the value of administrative regulations is greatest where an agency interprets legislative policy that is only set forth broadly in

227 See, e.g., *Purity Supreme*, 407 N.E.2d at 297; *American Shooting Sports Council v. Attorney Gen.*, 711 N.E.2d 899, 902-03 (Mass. 1999). This principle is limited by issues such as preemption. See *infra* Part III.

228 See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see also *Flynn v. Cambridge*, 418 N.E.2d 335 (Mass. 1981); *Grocery Manufacturers of Am., Inc. v. Department of Pub. Health*, 393 N.E.2d 881 (Mass. 1979); *Levy v. Board of Registration and Discipline in Med.*, 392 N.E.2d 792, 801 (Mass. 1979).

229 See e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Zachs v. Department Pub. Utils.*, 547 N.E.2d 28, 31 (Mass. 1989) ("Administrative agencies may establish policy through either adjudicative proceedings or rulemaking.").

230 See, e.g., *Purity Supreme*, 407 N.E.2d at 303 (holding that the Massachusetts UDAP statute was intentionally phrased broadly).

231 See cases cited *supra* note 116.

232 See, e.g., OHIO REV. CODE ANN. § 1345.05(B)(2) (Anderson 1993) ("The Attorney General may adopt, amend and repeal substantive rules defining with reasonable specificity acts or practices that violate [the UDAP law prohibition on unfair or deceptive acts or practices] . . ."). State administrative law often has surveyed statutory grants of administrative authority and remarked that legislatures are well aware of the difference between a broad delegation of regulatory authority and a narrowly-cabined delegation. See, e.g., *Grocery Mfrs. of Am., Inc. v. Department of Pub. Health*, 393 N.E.2d 881 (Mass. 1979); *Levy v. Board of Registration and Discipline in Med.*, 392 N.E.2d 1036 (Mass. 1979); *Consolidated Cigar Corp. v. Department of Pub. Health*, 364 N.E.2d 1202 (Mass. 1977).

233 See *Grocery Mfrs.*, 393 N.E.2d at 886.

234 *Consolidated Cigar*, 364 N.E.2d at 1210; see also *Commonwealth v. Diaz*, 95 N.E.2d 666, 668 (Mass. 1950) (holding that the legislature may delegate to an agency the "working out of details" of a policy adopted by the legislature); *Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 203-04 (Pa. 1975); *State v. City of Auburn*, 510 P.2d 647, 653-54 (Wash. 1973). An agency has considerable flexibility in interpreting a statute which it is charged with enforcing. See *Scofield v. Berman & Sons, Inc.*, 469 N.E.2d 805 (Mass. 1984); *Grocery Manufacturers*, 393 N.E.2d at 886.

governing statutes.²³⁵ In such circumstances, the Supreme Court has noted, "[t]he prudent administrative body, being mindful of the scrutiny given to rules of general application established in ad hoc adjudication, should proceed by rulemaking where possible and practical."²³⁶

This point was understood by state legislatures, which, in their efforts to establish a flexible and forward-looking statutory scheme to combat commercial unfairness, granted state attorneys general a primary enforcement role through both litigation and regulation.²³⁷ The power to issue substantive regulations furthers the oft-repeated UDAP goal of reaching ever-changing business practices.²³⁸ It harmonizes with the comprehensive and flexible approach to consumer protection embodied in state UDAP laws. A more narrow interpretation of the regulatory authority would limit such flexibility and undercut the consumer protection principles that animate the UDAP statute.²³⁹

Nonetheless, manufacturers of potentially unsafe products seeking to avoid state regulation could frame this issue much differently. They could contend that had legislatures intended to empower the attorney general to regulate novel areas of unfairness (such as defective products), they surely would have so stated. These protests, however, ignore the essential characteristics of the state UDAP statutes, as well as the fundamental precepts of administrative law that are discussed above. In addition, two other basic factors undercut this objection to UDAP regulatory authority.

First, as discussed in Part II.B.1, UDAP laws are remedial statutes that are purposefully flexible and preventative. They are to address both unspecified, existing wrongs and "as-yet undevised" practices that injure consumers. Thus, the legislatures could not have known specifically what

235 See *Springfield School Comm. v. Board of Educ.*, 287 N.E.2d 438, 442 n.23 (Mass. 1972) (quoting *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 775-80 (1969)).

236 *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). Generally, however, state administrative law has been slower than federal law in rejecting the nondelegation doctrine. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 3.14-15 (1978).

237 In fact, the delegations of administrative authority in some UDAP statutes avoid these interpretation issues. These statutes authorize the state attorney general to "adopt rules that set forth with specificity the acts or practices" that are unfair or deceptive in violation of the UDAP statute. FLA. STAT. ANN. § 501.205 (1994); see also OHIO REV. CODE ANN. § 1345.05 (Anderson 1993); UTAH CODE ANN. § 13-11-5 (1999).

238 See *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973); *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297, 303 (Mass. 1980); *Commonwealth v. DeCotis*, 316 N.E.2d 748 (Mass. 1974). Thus, regulations may be prospective and preventative. See W. VA. CODE § 46A-6-107 (1998).

239 See *supra* Part II.B.1. For cases noting that UDAP laws are to be interpreted liberally, see *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Larsen v. Larsen*, 656 A.2d 1009 (Conn. 1995); *Standish v. Hub Motor Co.*, 254 S.E.2d 416 (Ga. Ct. App. 1979); *Western Acceptance Corp., Inc. v. Jones*, 788 P.2d 214 (Idaho 1990); *Hoke v. Beck*, 587 N.E.2d 4 (Ill. App. Ct. 1992); *Boubelic v. Liberty State Bank*, 553 N.W. 2d 393 (Minn. 1996); *Roosevelt Sav. & Loan Ass'n. v. Crider*, 722 S.W.2d 325 (Mo. Ct. App. 1986); *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991); and *State v. Therrien*, 633 A.2d 272 (Vt. 1993).

areas would fall within the purview of unfairness. Therefore, it would have been impossible for them to specify each such area and explicitly indicate that regulatory powers applied to that situation.

Second, there is no principled basis to prevent UDAP regulatory power from reaching certain sub-groupings of unfair practices. To limit artificially UDAP regulatory authority to substantive areas somehow more narrow than the statute itself would require an analysis of regulatory authority unique to UDAP and different from the administrative delegation analysis conducted for all other agencies. UDAP statutes themselves foreclose such a distinct analysis, as the majority expressly incorporate the standards of state administrative procedure acts for reviewing administrative regulations.²⁴⁰ As a result, manufacturers cannot convincingly contend that the absence of express authority to regulate consumer goods forecloses product safety regulation. That interpretation ignores the developed administrative law—incorporated into UDAP statutes by the legislature or the courts—which rejects such a stringent view of regulatory authority.²⁴¹ Accordingly, an attorney general need not point to language in the UDAP statute expressly authorizing regulations to define defective or unsafe products and to regulate their sale.²⁴²

Indeed, as noted previously, courts hearing challenges to state UDAP regulations have recognized that the attorney general can reach via regulation all matters of unfairness that fall within the purview of UDAP prohibitions.²⁴³ Moreover, they have declined to adopt a standard of review for attorney general regulations different than that for other agency regulations.²⁴⁴ Generally, UDAP regulations will be upheld so long as they address a matter of potential unfairness or deception and do so in a reasonable way.²⁴⁵ Product regulations are neither subject nor entitled to a different standard of review.

The prohibition on unfair conduct has been understood to reach the sale of defective and unsafe products,²⁴⁶ and UDAP regulatory authority

240 See, e.g., ALASKA STAT. § 45.50.491 (Michie 1998); OHIO REV. CODE ANN. § 1345.05(F) (Anderson 1993). Where the statutes do not expressly provide, courts have concluded that the standard for review of consumer protection regulations is identical to that of other administrative regulations. See, e.g., *Purity Supreme*, 407 N.E.2d at 303.

241 Generally, administrative regulations will be upheld so long as they are within the contours of, and not contradicted by, the express delegation of administrative authority. See, e.g., *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 363 (Minn. 1979).

242 See, e.g., *Purity Supreme*, 407 N.E.2d at 302. An agency's regulatory powers are "shaped by its organic statute and need not necessarily be traced to specific words." *Commonwealth v. Cerveny*, 367 N.E.2d 808 (Mass. 1977).

243 See, e.g., *Purity Supreme*, 407 N.E.2d at 297; *American Shooting Sports Council v. Attorney Gen.*, 711 N.E.2d 899, 902-03 (Mass. 1999).

244 See *Purity Supreme*, 407 N.E.2d at 303.

245 See, e.g., *Caldor, Inc. v. Heslin*, 577 A.2d 1009, 1014 (Conn. 1990); *Purity Supreme*, 407 N.E.2d at 306.

246 See cases cited *supra* notes 167-70 and accompanying text.

has been held to allow attorneys general to set specific prospective standards within the boundaries of unfairness. Thus, the regulation of defective and unsafe products through specific and generally applicable safety standards falls squarely within the attorney general's regulatory power under UDAP statutes. Existing state UDAP statutes provide a way to regulate the safety of certain products that fall through the product safety net. The next Part analyzes the utility of this state tool.

III. Evaluation of UDAP Regulations as a Solution To Address Unsafe or Defective Products That Fall Through the Safety Net

As noted in the previous Part, the recent confluence of developments in UDAP and administrative law provides an opportunity for a state attorney general to fill holes in the product safety net through UDAP regulation. The question remains whether an attorney general *should* use such regulatory authority. Below, we address normative and practical issues posed by the application of UDAP regulatory power in this context. While these issues present challenges for agency officials, practical experience both with prior actions by attorneys general and with the prior use of administrative power generally countenances against overvaluing these concerns. None provide a sound reason to abandon the development and use of this new consumer protection tool.

A. *Whether Generalized Rulemaking Loses the Benefit of an Evolving Standard for Commercial Unfairness*

As discussed in Part II.B.1, one of the core values of the UDAP prohibition on "unfair and deceptive" acts and practices is that it creates a standard that evolves over time.²⁴⁷ Case-by-case litigation permits this development by allowing each questioned act or practice to be analyzed in real-life contexts. The litigation approach to a particular commercial practice—including the sale of an unsafe product—does not demand the complete answer to an industry-wide issue. Rather, like the common law generally, the ongoing process of judicial inclusion and exclusion permits the UDAP standard to be continuously refined.²⁴⁸

It can be argued that an attorney general is short-circuiting this well-

²⁴⁷ See, e.g., *Purity Supreme*, 407 N.E.2d at 306 (holding that the open ended language of the UDAP law allows it to reach as yet undevised practices); *Gennari v. Weichert Co.*, 691 A.2d 350, 364 (N.J. 1997) (stating that the history of UDAP law is one of continuous expansion); *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 816-817 (Pa. 1974) (holding that the UDAP statute is an "adaptable tool for protection of public interest"); see also *American Fin. Serv. v. FTC*, 767 F.2d 957, 965-72 (D.C. Cir. 1985).

²⁴⁸ See, e.g., *Strahan v. State*, 633 So.2d 886, 887 (La. Ct. App. 1993); *Purity Supreme*, 407 N.E.2d at 303.

established process by creating regulations. Rather than allowing experience to serve as a developmental guide, the attorney general will be setting standards that apply across an array of situations, most of which have never arisen and many of which have not been foreseen. Whether this greatly increases the chance that the standard will be in error, and whether an area as important as product safety deserves a more cautious approach, are questions that any attorney general would do well to consider seriously.

However, a serious review counsels in favor of a regulatory approach for several reasons. First, in analyzing the route to a standard, one must not only look at the risks and potential harms generated by the regulatory approach, but also at the risks and harms generated by case-by-case development. Where the issue at stake is the sale of defectively dangerous products, delays in implementing safety standards will yield increased injuries. The tort approach to gradually promoting safe products requires victims to bring personal injury or wrongful death actions. In an area like childproofing handguns, an evolving standard reached through litigation will necessarily be built on the bodies of innocent consumers. By the time a case-by-case approach has addressed the plethora of possibilities inherent in product design issues, a great many interim victims will need to have adjudicated their individual cases. A regulatory standard, developed more on projected dangers and possible risks, circumvents the accidental injuries that are inherent in that evolutionary adjudicative methodology.

Second, when considering which vehicle for creating standards will better analyze the factual risks and possible consequences of design decisions, it is important to ask how each approach weighs and reviews the relevant data. In an evolving adjudicatory methodology, the essential inquiry is often one of causation or some other fortuitous issue necessary to establish liability (e.g., comparative negligence, proximate cause, obviousness of danger, privity, standing, or admissibility of evidence).²⁴⁹ In contrast, the regulatory process can focus completely on the safety of the product and the costs and benefits of possible design solutions to user risks. From this perspective, the exercise of rulemaking authority is far superior to the evolution of product safety standards through litigation.²⁵⁰

Finally, in comparing the regulatory approach to the case-by-case development of standards, it is also important to view the issues from the perspective of potential defendant sellers. While UDAP regulation of

249 See, e.g., *Wasylow v. Glock*, 975 F. Supp. 370 (D. Mass. 1996) (dismissing a product liability case for lack of causation); *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. 370 (D. Mass. 1996) (holding that a criminal act is a superseding cause); *State v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996) (rejecting tort claims for lack of standing).

250 Further, UDAP regulations also may be further honed over time as circumstances warrant, so that the valued flexibility of case-by-case development is not really lost. See, e.g., *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297, 308 (Mass. 1980).

product safety, in contrast to tort litigation, ultimately diminishes a manufacturer's opportunities to avoid liability if it sells defective goods,²⁵¹ it also provides certainty and prospective guidance.²⁵² Sellers and manufacturers know prospectively what is expected of them and can plan accordingly. Indeed, prospective standards replace post hoc enforcement suits by the attorney general. When viewed as an alternative to post hoc UDAP suits for penalties/injunctions, UDAP product regulations promote fairness to businesses.²⁵³ As courts have oft stated, when an agency is authorized to enforce a law through both regulation and litigation, the agency is wise to fill in the interstices of the statute through rulemaking to "simplify the process" and "advance the orderly conduct of business."²⁵⁴ That edict is particularly true in the context of promoting product safety, where a case-by-case evolution of product standards carries an unacceptable human price. Thus, lessened consumer risk, more-focused standard-setting, and even prospective fairness to sellers all favor using the regulatory approach.²⁵⁵

251 Case-by-case adjudication depends heavily on issues of proof related to incident-specific causation. The inability of a plaintiff to make such causal connections will absolve the defendant, even if the defective nature of the product is otherwise beyond question. See *supra* Part I.C.2.

252 Courts have acknowledged that prospective regulations offer a degree of fairness to business persons not readily achieved through post hoc litigation; regulations "mitigat[e] [the] possible vagueness" of UDAP statutes that were "intentionally left open-ended. . . ." *Purity Supreme*, 407 N.E.2d at 307; see also *Mourning v. Family Publications Serv., Inc.*, 411 U.S. at 365-66 (1973). The Alaska Supreme Court, in affirming judgment for the attorney general in a UDAP statute enforcement action, stated:

Substantive rulemaking is an invaluable adjunct to purely adjudicative proceedings because it shortens and simplifies the process and advances the orderly conduct of business. . . . We think that it would be the better practice for the Attorney General to exercise his discretionary rulemaking power to fill in the interstices of the Alaska [Unfair Trade Practices] Act rather than relying exclusively on adjudication.

State v. O'Neill Investigations, Inc., 609 P.2d 520, 534 n.49 (Alaska 1980).

253 Under a regulatory regime, a manufacturer that violated the regulations would still face court action, but such a suit would simply seek to hold the company to account for breaking established standards. Absent regulations, an attorney general's suit would likely seek to impose a standard that had never formally been applied, and might not have existed at the time the product was manufactured).

254 *O'Neill*, 609 P.2d at 534 n.49.

255 Even though regulations provide these benefits, a question arises as to whether they also might impinge on traditional tort rights of accident victims. For instance, defendants might argue that the regulations set the ceiling for required conduct. While there is some danger that regulations could be construed as foreclosing tort suits, regulatory standards are not generally considered to alter common law tort principles by implication. See RESTATEMENT (SECOND) OF TORTS § 288C (1965). A more novel question arises regarding whether a UDAP regulation can preclude a private UDAP statute suit seeking to hold a defendant to an even higher standard. While this theoretical issue is beyond the scope of this Article, the practical problem is unlikely to arise. Attorneys general could likely craft their regulations so as to keep such private rights intact. Cf. *infra* Part III.E (discussing the possibility that regulations may actually catalyze private actions).

B. *Whether Regulations Rob Manufacturers of Their Day in Court*

Traditional application of a UDAP statute to a product seller allows that defendant the opportunity to show a fact-finder the full context of its behavior and accords the seller ample opportunity to demonstrate that its behavior was not unfair.²⁵⁶ It can be argued that this rudimentary right is not available (at least in the traditional form) under a regulatory regime. Once regulations are in place, the unfairness of an act is specifically defined. Circumstance and context lose their relevance to some extent, and the seller necessarily loses some of the sympathy that would inevitably be present if the standard were crystallized post hoc. While the seller may still contest the standard, his position in court and his defense of his conduct are altered. It is important to consider whether some element of fairness is lost in the regulatory framework.

While these essentially tactical changes might raise a fairness concern in some circumstances, they do not do so here. Indeed, fairness counsels for, not against, a regulatory approach to product safety. Would-be defendants in litigation do not lose their day in court under a regulatory approach. Manufacturers affected by a UDAP product regulation not only can still challenge the regulation when it is applied to them and their conduct, but they also can challenge the standard more generically while it is being promulgated (by participating in the hearing process) and immediately (by bringing a declaratory judgment or administrative challenge). Although a regulation that results from the proper administrative process is accorded deference, it still must be the right standard, one that is reasonably related to its goal of preventing the sale of defective products.²⁵⁷ A manufacturer or seller has ample opportunity to challenge the proffered regulatory standard and argue that it is incorrect. Indeed, the focus of the sellers' "day in court" on this issue will be the product standard itself and whether it is reasonable.²⁵⁸ As discussed in Part I.C.2, tort adjudication diverts much litigative effort to other causal and procedural issues. A regulatory challenge can avoid these distractions,

256 See *Christie v. Dalmig, Inc.*, 396 A.2d 1385, 1388 (Vt. 1979) (noting that, at least where unfairness is absent or unclear, "merchants have a right to test, in a court of law, whether, in fact, warranties have been violated"). Negligence cases allow for a defendant to raise the exact context in which his product was created, and *also* allow him to explore issues such as the purpose for the product and likely consumer expectations. See, e.g., *Rhodes v. R.G. Industries, Inc.*, 325 S.E.2d 465 (Ga. Ct. App. 1984). This is true as well for many actions brought in strict liability. See, e.g., *Culpepper v. Weihrauch*, 991 F. Supp. 1397 (M.D. Ala. 1997).

257 See, e.g., *Purity Supreme*, 407 N.E.2d at 304-06; *Dalmig*, 396 A.2d at 1387-88. Moreover, this raises another fairness benefit of the regulatory approach. While an attorney general could commence a suit under any non-frivolous conception of "unfairness," he can only seek to impose a standard of conduct via regulations after a lengthy and rigorous hearing and comment process, which should cull any ill-conceived notions from the proposed standard. Thus, the seller is saved from having to defend against more extreme (and potentially less justified) demands on his commercial conduct.

258 See, e.g., *Purity Supreme*, 407 N.E.2d at 297.

providing a succinct and focused opportunity for a seller to present its point of view.

Moreover, as noted in the previous Part, any fairness analysis must consider that an attorney general authorized to issue detailed UDAP regulations is also empowered to bring enforcement actions to reach the same unfair commercial conduct.²⁵⁹ Absent regulations, a defendant's day in court typically arises post hoc, when a plaintiff seeks to apply a new standard to a manufacturer's prior conduct. The potential impact of post hoc standard-setting is particularly acute where an attorney general may seek civil penalties.²⁶⁰ In contrast, regulations seek to remedy unfair conduct across the industry in a prospective and preventative way, and only after a regulatory promulgation process. In this light, regulations are a more moderate and fair use of attorney general enforcement power, providing not only a "day in court" but also additional opportunities for input and challenge that are not available to sellers in traditional case-by-case UDAP enforcement.

C. *Whether the Regulatory Process Is Too Cumbersome, Slow, or Costly*

The history of state and federal administrative rulemaking demonstrates that it can take years to issue regulations.²⁶¹ Indeed, the promulgation of consumer protection regulations has been a gradual process, with many state attorneys general issuing only a handful of regulations after twenty or more years of authority.²⁶² Because new regulations must comply with state administrative procedure acts, an attorney general must be willing to commit significant resources to a lengthy hearing process and review of comments in addition to the drafting and redrafting of regulations.²⁶³ Thus, although regulatory authority

259 See, e.g., OR. REV. STAT. § 646.605 (1995); WIS. STAT. ANN. § 100.20 (West 1994). Some states also authorize administrative actions based upon prior conduct. See CONN. GEN. STAT. ANN. § 42-110(m) (West 1997); UTAH CODE ANN. § 13-2-6 (1999).

260 Litigation designed to bring change to industry practices often begins with a case against only one of several players in the industry, which some commentators view as raising its own series of fairness concerns. See, e.g., John Coffee, *Paradigms Lost-The Blurring of the Criminal and Civil Models-and What Can Be Done About It*, 101 YALE L.J. 1875, 1889 (1992); Bennett Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 394, 441 (1992). These issues are less pointed in a regulatory regime, where standards of conduct are published in advance.

261 See DAVIS, *supra* note 236, at 211-17. For example, following emergency promulgation of manufactured housing legislation in 1993, which directed the Massachusetts Attorney General to adopt relevant regulations as necessary, the attorney general began a regulatory process. See MASS. GEN. LAWS ANN. ch. 140, § 32S (West 1995). Final regulations were not promulgated until 1996. See MASS REGS. CODE tit. 940, § 10.00 (1999). Similarly, the United States Department of Justice was directed by Congress to promulgate rules for the use of certain investigative subpoena powers. See 31 U.S.C. § 3733(i)(2)(B) (1994). It did not promulgate provisions relevant to related subpoena issues until 1995. See 60 Fed. Reg. 61290 (1995).

262 See, e.g., ILL. ADMIN. CODE tit. 14, §§ 460, 470, 475 (1999).

263 See, e.g., MASS. GEN. LAWS ANN. ch. 30A, §§ 2-6 (West 1995); see also ARTHUR EARL

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provides a means to address a particular industry or practice comprehensively and prospectively, it still requires a substantial commitment of resources.

Given the sometimes discouraging history of regulatory promulgation, as well as the time and resources required to create product safety regulations, an attorney general would be wise to wonder whether the process is too cumbersome, slow, and costly to provide the consumer the relief it promises. While it is undeniable that regulations can be both time-consuming and expensive, these facts do not necessarily counsel against taking the UDAP regulatory route. Indeed, the time and expense can be viewed as serving as a necessary brake on ill-conceived or quickly-generated ideas that should undergo more serious consideration. These restraints also ensure that an attorney general will address only the most pressing consumer issues, while allowing the product safety net to work without interference in areas where it functions properly.

Moreover, the costs and duration of the regulatory process must be viewed in comparison with the alternatives of litigation. Use of traditional adjudicatory methods often leaves consumers without any immediate protection. While regulations may take years to finalize, enforcement litigation can take just as long, with little assurance that even successful litigation will result in the correct standard for product safety.²⁶⁴ Critically, in light of the various factors on which a judgment for defendants could turn, one test case, even if successful, is unlikely to affect industry-wide changes.²⁶⁵ Multiple suits may be necessary to bring about industry-wide implementation of standards for safety.²⁶⁶ When compared to litigation, the regulatory approach to product safety is relatively streamlined, expeditious, and ultimately less resource intensive.²⁶⁷

BONFIELD, STATE ADMINISTRATIVE RULEMAKING §§ 6.1.1 to 6.19.2 (1986).

²⁶⁴ See *supra* Part I.C.2.

²⁶⁵ See FRUMER & FRIEDMAN, *supra* note 61, § 1.08. Even when pecuniary liability is established for a negligently designed product feature, not all manufacturers will adopt the safety standard that results from the litigation. See *id.*

²⁶⁶ See ARTHUR EARL BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW § 5.3 (1989) (noting how rulemaking brings an immediate uniformity not usually available during forays into standard-setting by adjudication); see BONFIELD, *supra* note 263, at § 4.23.

²⁶⁷ See DAVIS, *supra* note 236, § 6.7. While the fact gathering and procedural requirements of the regulatory process vary from state to state and may be resource intensive in some venues, the cost of multiple enforcement suits against a variety of sellers would no doubt be far greater. Moreover, by setting forth prospective and detailed standards, the regulatory method ensures that fewer suits will be needed in the future to ensure that safe practices are followed. Indeed, even if the costs of potential litigative challenges to the regulations are considered, the regulatory approach still appears to offer a streamlined path to product safety. See *supra* Part III.B.

D. *Whether the Attorney General Has the Requisite Expertise To Regulate Dangerous and Defective Products*

Given the intricacies of the consumer product safety field, some observers might contend that an attorney general lacks the expertise to regulate products. A legislature, goes the argument, would not have delegated authority over product safety without ensuring sufficient staffing and expertise to analyze complex product safety issues. For instance, compare an attorney general's office with the CPC Federal Consumer Product Safety Commission, which Congress specifically authorized to conduct product safety studies and investigations, construct research and testing facilities, hire scientists, and procure personnel and resources from other government departments to assist in product safety oversight.²⁶⁸ While this argument may have a superficial appeal, it does not withstand scrutiny.

An undue focus on attorney general expertise in a particular product area would require that courts analyze UDAP regulatory authority differently than all other administrative delegations. It is presumed, and in fact demanded, that all agencies authorized to regulate in a particular commercial area will attain—through the hearings process and otherwise—the expertise necessary to promulgate effective regulations.²⁶⁹ The looming threat of judicial review of regulations ensures that agencies learn enough to issue standards that are consistent with the purpose and edicts of the statutory delegation and which reasonably achieve their desired purpose.²⁷⁰

Once again, the real undoing of the expertise objection to UDAP regulations is reached by comparing the expertise employed in the regulatory context to the expertise that is determinative in the alternative forum of litigation. In tort and UDAP litigation involving allegations of dangerous products, non-expert judges or juries make decisions on appropriate product standards. Not only are these fact-finders without independent expertise to determine complex issues of product standards, their sources of information are far more limited than those available to an administrative body. A judge reaching product safety decisions must rely on admissible evidence presented by the adversaries and determine an

268 See 15 U.S.C. §§ 2054(b), 2076(h), 2077, 2079(e) (1994).

269 See, e.g., *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297 (Mass. 1980).

270 See FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 250-62 (1965). Practical experience also belies any claim that attorneys general lack sufficient expertise to tackle product safety issues. For instance, some statutes outside of UDAP specifically direct the attorney general to regulate public safety issues, such as industrial safety or workplace regulation. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 6 (West 1995) (“[T]he Attorney General may determine what suitable devices or other reasonable means or requirements for the prevention of industrial or occupational diseases shall be adopted.”) § 13 (the workplace environment may be regulated by the Attorney General).

answer somewhere between polar opposite views. The administrative agency, in contrast, can arrive at industry standards after hearing *all* views through extensive hearings.²⁷¹

Furthermore, the UDAP statutes themselves specifically set limits on where the attorney general can apply expertise. State UDAP statutes usually provide that the attorney general may not regulate a matter if another agency is authorized to act in the field and has issued a standard for that conduct.²⁷² Thus, the attorney general may not claim expertise to act in an area where another agency has regulated pursuant to its authority. In this way, UDAP statutes guard against expansion of UDAP regulatory authority to areas where it does not belong.²⁷³ That, in turn, is the only expertise-based limitation on UDAP authority under the statute. Entertaining other expertise-based objections to UDAP regulation would undermine the legislative grant of authority provided in this context.

E. *Whether Regulations Will Spawn Harmful Private Litigation*

Although the attorney general, as promulgator of UDAP regulations, has primary responsibility for their enforcement, the matter does not end there. While responsible companies may welcome oversight from the attorney general to ensure that all competitors are complying with existing standards, they may also be concerned that regulations will spawn vexatious private litigation. Private parties, seeking to act as de facto private attorneys general, may barrage a seller with lawsuits, seeking either to advance their own private policy agenda by driving companies from the marketplace or leverage settlement monies in questionable cases. While such concerns can be exaggerated, it is important to consider whether private lawsuits can be or should be avoided in this context.

As an initial matter, it is unlikely that an attorney general can bar private plaintiffs from relying on regulatory violations as proof of their private UDAP claims. Most UDAP statutes specifically create a private cause of action, and provide that private parties that have lost “any money or property” due to an “unfair act or practice” may sue for damages and injunctive relief.²⁷⁴ Because UDAP regulations specifically set standards

271 Thus, the regulatory process is better suited for setting complex industry-wide standards in such circumstances. See BONFIELD & ASIMOW, *supra* note 266, at § 5.3.

272 See, e.g., OR. REV. STAT. § 646.605-.652 (1999).

273 See *Williams v. State Farm Mut. Auto Ins. Co.*, 763 F. Supp. 121 (E.D. Pa. 1991) (finding that the insurance statute offers the exclusive remedy); *Carlie v. Morgan*, 922 P.2d 1 (Utah 1996) (holding that the UDAP law does not reach rental property issues because of more specific state statute). But see *Miller v. Kelly*, 759 F. Supp. 199 (M.D. Pa. 1991) (ruling that UDAP law claims can apply to securities transactions, even though a more specific statute also applies); *Bisson v. Ward*, 628 A.2d 1256 (Vt. 1993) (stating that the landlord/tenant law does not occupy the field, so that UDAP law applies).

274 OR. REV. STAT. § 646.605 (1995); UTAH CODE ANN. § 13-11-19 (1999). But see MISS.

for unfairness, violations of those standards can be the "unfair practice" needed to support a private cause of action. Indeed, UDAP law is replete with examples of private parties bringing claims based on violations of attorney general regulations.²⁷⁵

State practice differs from the federal unfairness approach, which rejects a private right of action. Under the FTC Act, only the FTC itself may bring an action against a violator.²⁷⁶ Although private tort suits may attempt to use violations of federal unfairness standards as proof of negligence per se or as an analogy to state unfairness issues, the federal law does not generally countenance this approach.²⁷⁷

Regardless of which policy choice is correct, state law straightforwardly holds that the private right of action exists. While an attorney general might try to specify in his regulations that only he can enforce them, such an action would no doubt be challenged by private litigates. Moreover, given that legislatures generally envisioned a private enforcement presence under UDAP statutes, such an action would likely be inappropriate. Any attorney general promulgating regulations should be cognizant of the fact that private citizens will use the prospective provisions as an aid in their private suits.

This, however, does not mean that law-abiding companies will be overwhelmed by self-appointed private attorneys general. The private right of action is limited in a variety of ways. First, private parties can only bring an action under UDAP statutes if they have themselves directly suffered from the allegedly unfair practice.²⁷⁸ Private parties cannot bring an action for violation of regulatory standards without first showing (either pro se or through their lawyers) that they were directly injured by the alleged unlawful act.²⁷⁹

CODE ANN. § 75-24-1 (1999) (providing a more limited private right of action).

275 See, e.g., *Claude Nolan Cadillac, Inc. v. Griffin*, 610 So.2d 725 (Fl. Dist. Ct. App. 1993); *Kopischke v. First Continental Corp.*, 610 P.2d 668, 688 (Mont. 1980); *Jiries v. B.P. Oil Corp.*, 682 A.2d 1241, 1243 (N.J. Super. Ct. Law Div. 1996); *Vanney v. Capital-Lincoln Mercury Sales, Inc.*, 623 N.E.2d 177, 183 (Ohio Ct. App. 1993); cf. *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d 488, 493 (Or. 1984).

276 See *Baum v. Great W. Cities, Inc.*, 703 F.2d 1197, 1209 (10th Cir. 1983). However, private parties may bring a suit to enforce consumer product safety rules. See 15 U.S.C. § 2073 (1988). But cf. *Moe v. MTD Prods.*, 73 F.3d 179 (8th Cir. 1995).

277 But cf. *supra* note 32 (noting a limited cause of action available when CPSC regulations are violated).

278 See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 9 (West 1995); MONT. CODE ANN. § 30-14-133 (1995); OR. REV. STAT. § 646.638(1) (1995).

279 See, e.g., *Legg v. Castruccio*, 642 A.2d 906 (Md. Ct. Spec. App. 1994); *Levy v. Edmund Buick-Pontiac Ltd.*, 637 A.2d 600 (N.J. Super. Ct. Law Div. 1993); *Russell v. Atkins*, 679 A.2d 333 (Vt. 1996); cf. *State v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996) (finding no common law claims for Blue Cross to recover beneficiary's injury costs from tortfeasor). This is not to be confused with a privity requirement. As a general matter, UDAP statutes and case law have discarded that limitation. See, e.g., *Larsen v. Larsen*, 656 A.2d 1009 (Conn. 1995); *Warren v. LeMay*, 491 N.E.2d 464 (Ill. App. Ct. 1986). Thus, a person who is harmed by a product purchased by another may still

Even if they can pass this threshold, private plaintiffs are limited in their recovery options. Many states cap UDAP recoveries at actual damages in a variety of circumstances,²⁸⁰ and defendants may raise the usual litigative challenges to losses, including lack of mitigation. UDAP statutes do allow private parties to collect multiple damages, but usually only if they can make certain additional showings.²⁸¹

Finally, it must be remembered that private suits lack the two most important tools available under UDAP statutes: penalties and pre-suit investigative subpoenas. The attorney general is specifically authorized to seek penalties from defendants ranging up to \$10,000 per violation.²⁸² As each sale of a defective item may be a violation of the UDAP statute, the potential aggregate penalties can be quite serious, even for a large manufacturer. In addition, an attorney general may investigate a possible case using compulsory process and, thereby, gather the data needed to bring a suit even when the relevant information might not otherwise be publicly available. Because private parties cannot take advantage of either of these weapons, their ability to bring substantial cases is limited.²⁸³ The lack of penalties means that a private party typically cannot seriously harm a defendant, and the lack of pre-suit compulsory process significantly reduces the opportunity to develop a case and gather the information needed to file a suit. As a result, UDAP suits based on regulatory standards do not provide an attractive vehicle for private parties to harass industry.²⁸⁴

recover damages.

280 See, e.g., IDAHO CODE § 48-608 (1999); MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 1995); OR. REV. STAT. § 646.638(1) (1995). Such statutes frequently allow a minimum floor recovery for an injury caused by a UDAP statute violation in case specific damages are difficult to quantify. See *id.*

281 See, e.g., *Crooks v. Payless Drug Stores*, 592 P.2d 196 (Or. 1979) (holding that punitive damages are allowed only if aggravating circumstances exist); *Winton v. Johnson & Dix Fuel Corp.*, 515 A.2d 371 (Vt. 1986) (finding a showing of malice needed for "exemplary" treble damages). In addition, in some jurisdictions, private plaintiffs must show that their suit will advance a public policy goal, and that the alleged violation had a wider impact than just the individual transaction between the seller and the consumer. See, e.g., *Burdakin v. Hub Motor Co.*, 357 S.E.2d 839, 840 (Ga. Ct. App. 1987); *Rosa v. Johnston*, 651 P.2d 1228, 1232 (Haw. Ct. App. 1982). A small number of states do not require intent or other preconditions on the award of multiple damages. See, e.g., *Marshall v. Miller*, 276 S.E.2d 397 (N.C. 1981); *Huffmaster v. Robinson*, 534 A.2d 435 (N.J. Super. Ct. Law Div. 1986); see also UDAP, *supra* note 105, § 8.4.2.

282 See, e.g., N.J. STAT. ANN. §§ 56:8-3.1, :8-13 (West 1989); MISS. CODE ANN. § 75-24-19 (1999).

283 Moreover, unwarranted suits may be deterred by the UDAP provisions in some statutes that explicitly allow for attorney awards to prevailing defendants. See, e.g., OR. REV. STAT. § 646.638(3)-(4) (1999).

284 To the extent that UDAP laws provide a vehicle for harassment, it is important to note that the same potential exists without a regulation in place. A private party can currently bring an action alleging the unfair sale of what it believes is an unsafe product. See, e.g., *Maillet v. ATF-Davidson Co.*, 552 N.E.2d 95 (Mass. 1990). But see OR. REV. STAT. §§ 646.608(4), 646.638(1) (1999) (cabining private UDAP suits to specified types of unfairness, unless the Attorney General has also declared the practice unfair by regulation). Regulations add nothing to the potential for frivolous or unfounded suits. A suit based on a violation of a UDAP regulation necessarily alleges a violation of an

What UDAP suits based on regulations can do, however, is help compensate consumers for losses caused by company misdeeds. To the extent that a consumer was injured by a product that failed to meet product safety standards, the consumer will be able to make the seller bear the loss. Given that the standards are applied prospectively, there is no unfairness to professional sellers. Indeed, private suits provide a service to the state and to those sellers that obey the law by supplementing the attorney general's enforcement oversight and enhancing UDAP statute deterrence.

F. *Whether Consumers Are Better Off with the Status Quo*

Before promulgating any UDAP regulation, an attorney general is always faced with the question of whether issuing prospective standards will do more harm than good. While regulations are meant to protect consumers, they necessarily alter the current interactions between consumers and sellers. Regulations constrain how sellers can sell their goods and what they can offer in the marketplace. Costs of compliance with regulations are likely passed along to consumers. Regulatory provisions may not keep up with market developments and may hinder innovation. All of these concerns, along with the possibility that unskillfully drawn regulations may have unintended negative consequences, provide reasons to question critically whether regulations are actually needed in a given situation.

These questions certainly arise in the current context. Product safety regulations may well constrain consumer choice, raise prices, and hinder innovation. However, if the standards are reasonable floors for safety, it is unlikely that the impact will be very great. Moreover, the impact is almost certainly outweighed by the consumer safety benefits that well-drafted regulations can provide.

An illustration on this point may be useful. As noted in Part I, handguns are one set of products that currently fall through the consumer product safety net. There is essentially no safety regulation of the domestic handgun market, and only a weak tort deterrent. If reasonable regulations setting minimum safety standards are applied to handguns, would those regulations constrain consumer choice, raise prices, and hinder innovation? It seems unlikely for the following reasons. First, reasonable handgun safety regulations will take advantage of safety, design, and construction features already available to handgun producers. In the handgun market, many handgun manufacturers already use materials and designs of sufficient quality to prevent accidental discharges and explosions.²⁸⁵

existing prospective standard. Such a suit could hardly be called vexatious.

²⁸⁵ Voluntary testing of handguns confirms this analysis. See, e.g., U.S. DEP'T OF JUSTICE, EQUIPMENT PERFORMANCE REPORT: 9MM AND .45 CALIBER AUTOLOADING PISTOL TEST RESULTS,

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Similarly, many manufacturers already utilize at least some basic childproofing mechanisms.²⁸⁶ Such manufacturers could readily comply with reasonable regulatory requirements if they chose to do so. Thus, the only limitation on choice would be the elimination of fringe or errant market players that fail to use existing prevalent technology and readily available safety mechanisms.

Second, it is unlikely that such regulations would raise prices significantly. To the extent that major market players produce handgun models that already meet the standards, there is no reason to believe that those prices will change.²⁸⁷ All that will happen is that substandard models will disappear from commercial shelves. However, it is undeniable that the elimination of certain choices, especially those choices that were the least expensive (because they provided substandard protections or were designed cheaply and poorly), will mean that some consumers have to pay more for a new firearm. However, it is important to remember that the UDAP regulation will only apply to commercial sellers. A consumer seeking a very inexpensive weapon can still purchase a used gun from a hobbyist or, perhaps, depending on the exemptions in the regulations for existing goods, from a used-gun dealer.²⁸⁸

Third, in the handgun context, there is no evidence that regulation would hinder innovation,²⁸⁹ so long as the standards are carefully worded to leave development choices open to manufacturers and the regulator

(1987); U.S. DEP'T OF JUSTICE, EQUIPMENT PERFORMANCE REPORT: .38 AND .357 CALIBER REVOLVER TEST RESULTS (1987).

286 See, e.g., SHOOTERS BIBLE 98-204 (1997) (identifying handgun features, including safety features); *President, Handgun Makers Find Common Ground*, WASH. POST, Oct. 10, 1997, at A16 (noting major firearms manufacturers' commitment to provide childproof trigger locks on their firearms). Numerous manufacturers also have experience with additional user safety devices, which they have historically included in some of their handgun designs and which are still available on a variety of models today. See Vernick et al., *supra* note 11, at 431-33.

287 An argument can be made that removing the cheapest handguns from the market will reduce their price-constraining influence on the other products for sale. Such a position ignores the price competition between the remaining makes and models, which should continue to keep prices down. Cf. Philip Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 68-69 (1995) (analyzing whether primary market restrictions increase prices of used guns).

288 See, e.g., *Young v. Joyce*, 351 A.2d 857 (Del. 1975); *Billings v. Wilson*, 493 N.E.2d 187 (Mass. 1986). But see *Singleton v. Pennington*, 568 S.W.2d 367 (Tex. App. 1977). In addition, it is important to keep in mind that many safety devices and design modifications may not greatly increase the marginal cost of a handgun. However, using dependable materials instead of dangerously defective ones may substantially increase production costs. See LAWRENCE H. VAN VLACK, *ELEMENTS OF MATERIALS SCIENCE AND ENGINEERING* 501-40, 556 (6th ed. 1989); GAREN J. WINTERMUTE, *RING OF FIRE: THE HANDGUN MAKERS OF SOUTHERN CALIFORNIA* 18-19 (1994); Garen J. Wintermute, *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 JAMA 1743, 1752 (1996); see also SHOOTERS BIBLE, *supra* note 286, at 98-204 (listing prices of similarly equipped handguns made of different materials).

289 The recent history surrounding one innovation, the "smart gun" which operates only for its user, suggests that the industry may in fact stifle safety innovation absent a regulatory push. See Paul M. Barrett, *Personal Weapon: How a Gun Company Tries to Propel Itself into the Computer Age*, WALL ST. J., May 12, 1999, at A1.

continues to monitor industrial developments to take new technologies into account. In the handgun industry, regulation is needed specifically because certain manufacturers have failed to innovate or even adopt existing technologies. Current safety advances in this industry are often based on either federally funded research²⁹⁰ or development programs funded by large-market players that are focusing on a safe-product market niche.²⁹¹ Neither of these types of efforts are likely to be cut back due to state regulation. By setting the floor at a reasonable level and requiring nonconforming manufacturers to update their products to modern standards, state regulators may well provide new opportunities for inventors and niche-market players that can help these manufacturers upgrade their products.²⁹² Regulations also may increase consumer awareness of safety and make it a more important marketing tool for sellers. If worded properly, regulations need not have any negative impact on market innovation or otherwise thwart nascent consumer safety developments.

Even if product regulation for handguns would raise prices, limit choice, and alter the natural market development path of the handgun industry, these disadvantages must all be weighed against the benefits that would accrue from blocking the existing hole in the product safety net. In the case of handguns, there are over 1500 accidental deaths per year, more than almost any other consumer product.²⁹³ Many of these deaths are not purchasers but innocent third parties, including young children. Although estimates vary, thousands of additional accidental injuries occur annually due to defective or unsafe handguns.²⁹⁴ Simple safety devices or design changes, many of them available for generations, could prevent these harms. A study by the General Accounting Office indicated that almost one-third of the accidental handgun injury fatalities in general, and *all* such injuries resulting from young children handling weapons, could be eliminated by use of simple devices already employed by some industry

290 See, e.g., D. R. WEISS, NAT'L INST. OF JUSTICE, SMART GUN TECHNOLOGY PROJECT FINAL REPORT (1996).

291 See, e.g., Barrett, *supra* note 289, at A1; David B. Ottaway, *A Boon to Sales or a Threat? Safety Devices Split Industry*, WASH. POST, May 20, 1999, at A1.

292 See, e.g., Paul M. Barrett, *There's a Catch, Simple Invention Points Up Complexity of Gun Control Suits*, WALL ST. J., Apr. 23, 1999, at A1.

293 See 1995 ANNUAL REPORT, *supra* note 26, tbl. 1.

294 See, e.g., J. Annett, *National Estimates of Non-Fatal Firearm Related Injuries*, 273 JAMA 1749 (1995); N. Sinauer, *Unintentional Nonfatal Firearm Related Injuries*, 275 JAMA 1740 (1996). In addition, there have been several attempts to quantify the dollar-value damage caused by handgun injuries. While these estimates vary greatly, it appears that medical expenses alone from handgun accidents cost over \$100 million every year. See, e.g., W. Max, *Shooting in the Dark: Estimating the Cost of Firearms Injuries*, HEALTH AFF. 171, 172-81 (Winter 1993); Ted R. Miller & Mark A. Cohen, *Costs of Gunshot and Knife Wounds in the U.S.* 6-11, tbl. 8 (1993) (unpublished manuscript on file with the author).

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participants.²⁹⁵ When faced with such large-scale, preventable carnage, it is hard to argue that no action is the best course.

G. *Whether Such Decisions Should Be Left to the State Legislature*

Another serious issue that an attorney general must consider is whether the product safety crisis is a matter better left in the hands of the state legislature. After all, under the state constitutions, the attorney general is first and foremost a law enforcer. The making of law is not the prototypical executive branch function.

While true as an abstract point, this question has little bearing on the matters at hand. An attorney general would not promulgate regulations based on inherent constitutional authority, but based on an express delegation of administrative authority from the legislature. The state legislatures could have tried to craft detailed statutes that specifically defined unfairness.²⁹⁶ They explicitly chose not to do so and instead empowered and directed the attorney general to develop unfairness law through regulations.²⁹⁷

295 U.S. GEN. ACCOUNTING OFFICE, *supra* note 10, at 17. It is important to remember, though, that prospective changes would only effect new gun purchases. With an estimated 70 million handguns in circulation, it is unclear how long it would take for new standards to have a decisive impact on the annual accidental injury rates. See U.S. DEP'T OF JUSTICE, GUNS USED IN CRIME 2-3 (1995). However, there is some evidence that newer handguns are disproportionately involved in certain types of handgun fatalities. See Stephen W. Hargarten et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42 (1996). If the trend holds true for accidental injuries, that may indicate that much of the older existing stock either is not readily accessible in consumer homes or is no longer functioning. That in turn would support claims that changes in standards for commercial sales can have a large impact on a relatively short time horizon.

296 The legislatures could also have left the definition vague and relied upon case-by-case adjudication to develop the meaning of unfairness. That UDAP states also rejected this alternative shows their desire that the attorney general provide prospective guidance to industry regarding the meaning of unfairness.

297 See, e.g., IDAHO CODE § 48-604 (1999); MASS GEN. LAWS ANN. ch. 93A, § 2(c) (West 1995); N.J. STAT. REV. § 56:8-4 (1989). As part of their police power role, several state legislatures that have been able to overcome political obstacles have enacted safety standards for certain products that fall through the safety net. In the case of handguns, several of these states opted for very specific and detailed statutory standards. See CAL. PENAL CODE, §§ 12125-12133 (West 1999); HAW. REV. STAT. § 134-15 (1999); S.C. CODE ANN. § 23-31-18 (Law Co-op. 1976). However, these provisions are criminal statutes, rather than consumer protection provisions. Thus, they provide a less flexible and, in practice, a less enforceable remedy to state enforcement authorities. Moreover, those legislatures with older statutes have not revisited the issues to adapt their requirements to industrial innovations. For instance, South Carolina's statute requires that certain metal handgun parts be subject to a melting-point test. While melting point serves as a cheap and simple surrogate for direct tests on the strength and durability of metals commonly used in gun manufacture, the statute does not account for industry developments that enable certain parts to be made of plastic resins. See J. GORDON, THE NEW SCIENCE OF STRONG MATERIALS 229 (2d ed. 1976); VAN VLACK, *supra* note 288, at 263-74, 383-99. Any parts made of these resins simply evade the South Carolina tests. Similarly, inventive manufacturers could experiment with alloy composition of their metal parts, in order to "tweak" the melting point without having to really address the durability issue. See HANDBOOK OF CHEMISTRY AND PHYSICS 12:159 (D. Linde ed., 1995); GORDON, *supra*, at 229; VAN VLACK, *supra* note 288, at 527-73; Wintemute, *supra* note 288, at 1752. Despite these problems, the South Carolina legislature

This legislative decision is quite rational, given the expansive time commitment required to write and update a specific business practices statute. As noted in Part I, the federal consumer protection regimen has followed this administrative route. It makes possible a more objective, detailed, and flexible analysis of specific safety issues than could practicably work their way into a detailed statute.²⁹⁸ It also ensures, in a way that a legislature could not, that every interested party will have an opportunity to contribute to the creation of a standard.

Legislatures could have chosen a more limited delegation of authority,²⁹⁹ but instead they relied upon attorneys general to carry the specifics into prospective standards. Given the statutory delegation, it would be more like an abdication of responsibility, rather than a demonstration of prudent deference, for an attorney general to resist this UDAP role.

H. *Whether This Is an Aggregation of Power Without Realistic Limits*

Even assuming that the legislature did intend for the attorney general to set prospective standards for unfairness, this does not mean it would be necessarily prudent for an attorney general to use them to set product standards. Unfairness law has developed to encompass matters never specifically considered by legislatures at the time they enacted UDAP statutes.³⁰⁰ Might a foray into these newly expanded areas, such as product safety, cause a reaction from the legislatures? Might it lead to statutory

has not been able to revisit this issue and correct these problems. Even if it did, new problems would likely arise that would require renewed attention. This may be why other states that have been able to pass gun safety standards have delegated the task of setting standards to regulatory bodies. *See, e.g., MD. CODE ANN., art. 27, § 36J (2000).*

298 *See* 15 U.S.C. §§ 41-58 (1994); 15 U.S.C. § 2052 (1994).

299 Some states did provide more limited delegations. *See, e.g., GA. CODE ANN. § 10-1-394 (1999)* (limiting regulatory authority to adopting FTC rules and allowing promulgation only in limited circumstances). However, the fact that such language changes were not more widely attempted shows that state legislatures were generally supportive of attorney general regulatory authority. The only specific limitation on the regulatory authority widely adopted under UDAP law arises in areas where another state agency has been given specific authority to approve certain types of conduct. *See, e.g., IDAHO CODE § 48-605(1) (1999); MASS. GEN. LAWS ANN. ch. 93A, § 3 (West 1995).* Courts have been reluctant to expand these restrictions. *See, e.g., Larsen v. Larsen, 656 A.2d 1009 (Conn. 1995)* (finding that UDAP laws have express exemptions); *Lemelledo v. Beneficial Management Co., 674 A.2d 582 (N.J. Super. Ct. App. Div. 1996)* (finding that UDAP laws can apply with other statutes unless another single forum is designed to address all industry issues); *Dreier Co. v. Unitronix Corp., 527 A.2d 875 (N.J. Super. Ct. App. Div. 1986)* (explaining that the fact that the UCC governs an area does not block UDAP laws). *But see In re Prudential Ins. of Am. Sales Practices Litig., 975 F. Supp. 584 (D.N.J. 1997)* (holding that a suit based on UDAP laws was preempted by the state insurance scheme).

300 That does not mean that product safety was ignored, but that the area was relatively nascent when UDAP laws were passed. Indeed, at that time, Congress had not even constructed the current product safety net or created the CPSC. Later debates on unfairness did begin to touch on product safety issues, at least at the federal level. *See supra* note 40 and accompanying text. However, even these allusions to the issue did not take the center stage in congressional unfairness discussions. The area was simply too new to warrant or expect a great deal of focus.

amendments to cabin attorney general authority or otherwise reduce the consumer protection purview of these statutes? In addition, given the expansive nature of the current case law, is an attorney general faced with a normative issue of whether it is even appropriate to utilize these powers?

While these questions are somewhat interesting, they do not really apply in the current context. Although regulations in a given area may give rise to political countermeasures, attorney general regulatory powers under UDAP statutes are not practically so broad as to raise sustainable legislative concern. They simply do not provide a picture of excess authority that UDAP's enemies could exploit, nor do they present any true normative issue for an attorney general.³⁰¹

Attorney general authority is practicably limited to the very products that currently fall through the federal safety net. To begin with, federal consumer product safety statutes, such as the Consumer Product Safety Act, have specific preemption provisions that bar state action once federal regulations address an issue.³⁰² Moreover, while a wide variety of products are not currently subject to these regulations, the mere possibility of action by federal regulators is enough to discourage state regulations. State administrative process requires an attorney general to undertake a lengthy, expensive, and time-consuming hearing process before issuing product standards.³⁰³ No attorney general will want invest that kind of time, money, and effort only to have a federal agency pre-empt him before the close of the process.³⁰⁴ The very products that an attorney general will be interested in addressing could well be ones that might eventually also catch the attention of federal authorities. Indeed, the public attention that an attorney general necessarily would draw when initiating a rulemaking process would itself likely attract federal agencies to the issue. Thus, from a practical standpoint, state UDAP regulation outside areas of federal

301 Legislators concerned that UDAP regulatory authority allows for too much product safety decisionmaking outside the legislature should think twice before trying to cabin an attorney general's regulatory powers. Such limitations would only encourage alternative methods of challenging industry, such as post hoc UDAP and tort suits. While not particularly effective consumer protection tools, they are in any event even less subject to legislative oversight than attorney general regulatory initiatives. See *supra* Part I.C.2.

302 See, e.g., 15 U.S.C. § 2075(a) (1994); cf. *Moe v. MTD Prods.*, 73 F.3d 179 (8th Cir. 1995) (holding that CPSC standards preempt state regulation-based and tort-based actions); *State ex rel. Jones Chemicals v. Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994) (holding that the federal Hazardous Substances Act preempts a tort claim on a similar subject).

303 See, e.g., OHIO REV. CODE ANN. § 1345.05 (Anderson 1993) (all rules adopted per state APA). See generally BONFIELD, *supra* note 263, at 156-439.

304 This "deterrent effect" on state attorneys general may be substantial, even if the federal agency's relative inactivity has begun to erode its deterrent effect on manufacturers. While a manufacturer's continued substandard production may not goad a somnolent federal agency into setting standards, an imminent rulemaking by an attorney general, which would draw governmental and public attention and, thereby, threaten to embarrass the federal agency by highlighting its inactivity, might catalyze just such an outcome. Thus, an attorney general could well expect a federal response even if manufacturers have tended to discount that possibility.

exemption is somewhat improbable. A state attorney general is more likely to lobby the federal agencies to take action in these circumstances in lieu of taking on such a regulatory burden directly.

In addition, the same state hearing process that makes many regulatory initiatives unpalatable also ensures that any resulting regulations are well thought out and the product of meticulous review. While an attorney general could initially commence a rule-making proceeding with expansive regulatory goals, the result of hearing opposing views at length and of compiling facts to support his finished regulations will temper any such decisions. Moreover, the resultant regulatory provisions are still subject to judicial review.³⁰⁵ This requirement that the regulations actually address issues of unfairness and do so in a reasonable fashion is the lynchpin of administrative law. The critical role of the courts ensures that regulations are appropriate and provides a very real barrier against overreaching. UDAP regulatory experience already shows that courts take this responsibility seriously. When courts believe regulations go too far, they do not hesitate to remind the attorney general of the limits of his authority.³⁰⁶

Finally, from a practical perspective, it is important to remember that an attorney general generally is an elected official.³⁰⁷ Thus, any regulations that an attorney general proposes may in any event be sensitive to the public will. This obviates the need for the attorney general to pay special attention to the risks posed to UDAP by such regulating; the attorney general will be subjecting himself to the same risks and is not likely to step into them either lightly or unprepared. Regulations under UDAP statutes, therefore, will be reasoned, well-measured, and enacted only when a demonstrable need arises.

I. *Whether Federal Inaction Should Mean Inaction by the State Attorney General*

A final serious policy consideration is whether a state attorney general should follow the lead of the federal government. One could view the current exemptions in federal statutes and the fairly restrained hand of the federal regulators as a conscious decision to have market forces set the safety standards for many products. Should the states act despite this federal decision not to intervene? UDAP statutes certainly stress that

305 See *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297 (Mass. 1980); *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 363 (Minn. 1979).

306 See *Ran Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1360 (N.J. 1992); *Christie v. Dalmig, Inc.*, 396 A.2d 1385, 1387-88 (Vt. 1979).

307 But see TENN. CONST. art. VI, § 5 (establishing that the attorney general is appointed by the Tennessee Supreme Court).

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application of the law should be guided by federal decisions and administrative actions under the unfairness doctrine.³⁰⁸ Thus, is it appropriate for an attorney general to use UDAP powers to remedy dangers that federal regulators have left untouched?

The short answer is simply "yes." While there may be legitimate reasons to accept the product safety status quo, the need to defer to federal decisions is not one of them. Federal silence, or even emphatic determinations not to act in the product safety arena, does not countenance state-level inaction for several reasons.

First, congressional or federal administrative determinations not to act in an area may be just a decision that the matter is best left to the states. Often, nonaction by federal authorities is simply a recognition of state expertise or interest in an area. Indeed, an entire tier of the existing safety net is based on the continued viability of state product liability tort law.³⁰⁹ Moreover, this preference for state regulation and action is reflected in the preemption case law: unless Congress specifically bars state action, it is presumed that the federal legislators intended the states to continue to exercise their traditional police and regulatory powers.³¹⁰

Second, so long as a state attorney general has no constitutional responsibility not to act,³¹¹ an attorney general's primary responsibility is not to the preferences of Congress or federal regulators but to the state. The views of the state legislature and high court must be an attorney general's primary guide in determining his or her duties.³¹² The UDAP statutes, which reflect these views, are very clear on the level of deference to be provided to federal policy makers. UDAP development is not to be constrained by federal limitations, although the development of unfairness is to be "guided by" federal views of the term.³¹³ This guidance is only relevant to the extent that the state courts have not already set forth boundaries for unfairness. Given that the UDAP state case law has already indicated that the sale of sub-merchantable or unsafe products is "unfair," no "guidance" is needed.³¹⁴

308 See, e.g., CONN. GEN. STAT. ANN. § 42-110b(b) (West 1997); GA. CODE ANN. § 10-1-391(b) (1999).

309 See, e.g., *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293, 1298 (D. Minn. 1988); *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1035 (N.D. Ind. 1981).

310 See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

311 If federal policy properly pre-empted state involvement, state attorneys general would be bound to support the federal law. See U.S. CONST. art. 1, § 8 (Supremacy Clause).

312 Cf. *T&W Chevrolet v. Darvial*, 641 P.2d 1368 (Mont. 1982) (noting in dicta that a state UDAP agency need not adopt FTC interpretations of unfairness; the state statute sets its own standards for unfairness as interpreted by the courts); *Hinds v. Paul's Auto Werkstatt, Inc.*, 810 P.2d 874, 875 (Or. Ct. App. 1991) ("[The] policy reasons that the FTC gave . . . do not determine the construction of [UDAP laws].").

313 See, e.g., CONN. GEN. STAT. ANN. § 42-110b(b) (West 1997).

314 See, e.g., *Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297, 309 (Mass. 1980);

This view is further bolstered by the legislatures' directive to the attorneys general regarding regulatory powers. As noted in Part II.C, these powers are quite broad. The standard UDAP limitation relating to federal law is that the regulations may not be "inconsistent" with federal strictures on unfairness.³¹⁵ Case law interprets this UDAP provision as not barring attorney general regulations unless there is an actual conflict between the regulation and an existing federal requirement.³¹⁶ Thus, legislatures intended for attorneys general to act in areas where federal regulators or Congress were silent.³¹⁷ The fact that federal regulators have chosen not to set standards for a product, or that federal law has exempted a product from federal regulation, does not mean that an attorney general should avoid these areas.³¹⁸ The legislatures did not envision such a timid and narrow role for the main enforcer of state consumer protection policy. Absent a specific prohibition by Congress or authorized federal regulators,³¹⁹ a state attorney general is free to protect state citizens from threats of harm, including threats posed by dangerous products. Federal silence on these issues does not provide a justification for avoiding this responsibility.

IV. Practical Predecessors for UDAP Product Regulation

One additional question regarding this UDAP regulatory solution to

Vermont v. International Collection Serv., Inc., 594 A.2d 426, 432 (Vt. 1991) (noting that other courts "have [not] felt constrained . . . by the requirement to follow interpretations of the FTCA, although [their statutes] contain such a requirement").

315 See, e.g., CONN. GEN. STAT. ANN. § 42-110b(c) (West 1997); FLA. STAT. ANN. § 501.205(2) (Harrison 1994); VT. STAT. ANN. tit. 9, § 2453(c) (1993). But see OHIO REV. CODE ANN. § 1345.05 (Anderson 1993) ("In adopting regulations . . . due consideration and great weight shall be given to FTC orders . . .").

316 See, e.g., *Kopischke v. First Continental Corp.*, 610 P.2d 668, 687 (Mont. 1980); *Hinds v. Paul's Auto Werkstatt, Inc.*, 810 P.2d 874, 875 (Or. Ct. App. 1991).

317 See *Normand Josef Enters. v. Connecticut Nat'l Bank*, 646 A.2d 1289, 1302 (Conn. 1994) (holding that Connecticut can issue unfairness regulations in areas that the FTC has not regulated and cannot regulate); *Department of Legal Affairs v. Rogers*, 329 So.2d 257, 267 (Fla. 1976) (stating that FTC inaction with respect to conduct does not mean state regulations are precluded); *Totz v. Continental DuPage Acura*, 602 N.E.2d 1374, 1381 (Ill. App. Ct. 1992) (arguing the fact that the FTC used-car rule did not require affirmative disclosures does not mean Illinois consumer cannot demand them under state statute); *Kopischke*, 610 P.2d at 687-88 (approving regulations because they do not directly conflict with any FTC regulations). But cf. IDAHO CODE § 48-618 (1999) (creating defense for defendants that can show practices "are subject to and comply with statutes administered by the FTC, or any duties, regulations or decisions interpreting such statutes").

318 Cf. *Raymer v. Bay State Nat'l Bank*, 424 N.E.2d 515 (Mass. 1981); *Dodd v. Commercial Union Ins. Co.*, 365 N.E.2d 802 (Mass. 1977).

319 Vague federal policy statements are not enough to satisfy this requirement. See *International Collection*, 594 A.2d at 430 (rejecting an earlier FTC position paper on unfairness "ambiguously [expressed] in a letter, of uncertain legal effect, to two members of Congress. Whatever the effect of the letter within the FTC, we are reluctant to view it as a definitive FTC interpretation of the FTCA, as contemplated by our law"); see also *American Fin. Servs. v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985); cf. *Sawash v. Suburban Welders Supply Co.*, 553 N.E.2d 894, 896 (Mass. 1990).

the consumer product safety problem is whether state attorneys general are ready for the challenge. This query does not address their substantive expertise (discussed in Part III.D), but more the issue of procedural competence. An attorney general regulating goods under a UDAP statute must be able to write the standards properly, gather information according to administrative procedures, and work the end product into the existing consumer protection framework without unintended consequences. Given the importance of safety standards, and the harm that can stem from doing the job improperly, is it prudent for an attorney general to venture into this arena at this time? Should an attorney general first hone his or her regulatory skills in other, simpler areas?

The answer is that an attorney general likely has all the experience needed. While the concept of promulgating UDAP regulations centered on product safety standards is a novel one, the offices of many attorneys general have substantial experience with promulgating consumer regulations in other contexts. Even if a particular attorney general does not have personal experience with any regulatory endeavors, the attorney general's office will have an experienced staff with more of an institutional memory. Moreover, an attorney general can seek assistance from the offices of other attorneys general that have been through the regulatory process many times.

Attorneys general have drafted, promulgated, defended, and successfully implemented a broad variety of UDAP regulations during the past twenty years.³²⁰ While these regulations have generally focused on issues of disclosure and methods of solicitation,³²¹ they nevertheless involve the regulation of merchant conduct. The process for crafting and enacting such provisions is very similar to the synthesis required to promulgate product safety standards. In both arenas, it is necessary to understand the harms facing consumers, the industry that is soliciting the sales, the possible alternative ways that consumers can be provided with goods, and the likely burden that potential remedies will place on industry. Both types of regulation may require at least some technical understanding of the products at issue and the patterns of use to which the products are put.³²²

320 The Massachusetts Attorney General's Office, for instance, has put into effect 11 sets of UDAP regulations governing various types of commercial conduct and is currently shepherding a 12th towards full implementation. *See* MASS. REGS. CODE tit. 940, §§ 3.00-16.00 (1999). A variety of regulations have also been promulgated in other leading consumer protection states. *See* ILL. ADMIN. CODE tit. 14, §§ 460, 470, 475 (2000); OHIO ADMIN. CODE § 109:4-3 (1988); WIS. ADMIN. CODE §§ 109-137 (2000).

321 *See, e.g.*, CONN. AGENCIES REGS. § 42-110b-18 (2000); IDAHO ADMIN. CODE § 04.02.01-30 (2000); CODE ME. R. § 26-239-100(3) (1999); MD. REGS. CODE tit. 2, § 01.01 (2000); MO. CODE REGS. ANN. tit. 15, § 60-4.030 (1999).

322 Without an understanding of the underlying product, it is not possible to know what information is relevant and thus should be disclosed. Indeed, to the extent that the disclosures are

Such experience is not limited to issues of disclosure. Many UDAP regulations focus on substantive restrictions on seller behavior that go far beyond providing consumers with information. From mobile home communities³²³ to mortgage broker practices,³²⁴ attorneys general have used UDAP statutes to establish specific standards governing how professional sellers must act in the general marketplace.

Attorney general regulations governing the service industry provide a close analogy to the types of product regulation suggested in this Article. When UDAP regulations require that rustproofers treat certain relevant car parts when they perform their services,³²⁵ that basement waterproofers utilize only certain types of reliable methods,³²⁶ and that insulation installers perform their job only in a certain fashion,³²⁷ these restrictions protect consumers by barring the sale of defective services. Defective services and defective goods both pose potential dangers to consumers, and both types of dangers can be avoided if the seller takes reasonable care in preparing what he is offering for sale.³²⁸ The nature and use of services often makes them difficult to distinguish from products that do not have physical shape and tangible form.³²⁹ An attorney general's regulation of such items/services might in some eyes be considered more difficult than the regulation of devices that one can feel and examine. It is simpler to see the dangers of a handgun made of defective materials than to identify what are acceptable risks for consumers participating in new mortgage loan structures. Yet, mortgage loans, as well as broker behavior in selling them, are the subject of UDAP regulatory oversight.³³⁰

Perhaps even more to the point, some attorneys general have already completed initial forays into the product regulation arena as part of their comprehensive oversight of certain commercial activities and now have some practical experience administering such provisions. This experience should help guide them, as well as other attorneys general who are crafting

warnings of product-related hazards, the similarity is even more complete. See *In re Harvester*, 104 F.T.C. 949, 1064-67 (1984).

323 See WIS. ADMIN. CODE § 125.

324 See MASS. REGS. CODE tit. 940, § 8.00.

325 See CODE ME. R. § 26-239-105.6.

326 See WIS. ADMIN. CODE § 111.03(7).

327 See CODE ME. R. § 26-239-100.

328 For instance, attorneys general have regulated services where the products installed by the service person may pose serious health risks if installed or handled improperly. See, e.g., CODE ME. R. § 26-239-100; OHIO ADMIN. CODE § 109:4-3-14 (1998); WIS. ADMIN. CODE § 136.10(1-9).

329 This issue can arise in very diverse contexts. See, e.g., Clint Smith, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT'L TAX & BUS. L. 97, 124 (1993) (noting that traditional economic distinctions may classify services as intangible products); Lori Weber, *Bad Bytes: The Application of Strict Products Liability to Computer Software*, 66 ST. JOHN'S L. REV. 469, 472 (1992) ("[B]ecause computer software contains both tangible and intangible properties, its classification as either a good or a service is problematic.").

330 See, e.g., MASS. REGS. CODE tit. 940, § 8.00 (1999).

regulations, in drafting even better provisions in the future.

While the regulations that include these product standards are more generally focused on informational issues and other types of seller conduct, they do set specific standards for commercial products.³³¹ Defective meat³³² and “defective” pets³³³ are both governed by UDAP regulations that are now in effect. Similarly, UDAP laws have been used to enforce safety requirements regarding electricity and certain electrical equipment.³³⁴ The experience gleaned from such administrative undertakings, which can be shared among attorneys general, no doubt seasons these regulators for further regulatory work.³³⁵

Such regulations show that, even in initial attempts, UDAP enforcers can make the shift from service regulation to product regulation without difficulty. When challenged, the pet regulations were treated no differently from any other UDAP regulations. The inclusion of specific product standards in these mainly informational consumer protection regulations raised no special issues for the reviewing court, and the UDAP regulations were crafted well enough to survive review.³³⁶ Taking this as an example, there is no reason that UDAP enforcers cannot craft and implement regulations more fully focused on product characteristics. An attorney general considering the “procedural competence” issue need not be overly concerned. The attorney general’s experience as an enforcer of UDAP statutes combined with the broad range of UDAP regulatory experience available as guidance provides sufficient preparation for this challenge.

331 The fact that attorneys general set such standards in the past, even if they did not expressly do so based on their authority to regulate product characteristics under UDAP laws, supports the idea that the development from informational and conduct requirements to product regulation is a natural progression, and that it is a natural outgrowth of the regulatory efforts already undertaken by attorneys general in consumer protection. Indeed, such specific standards are a perfect follow-up to more generalized regulatory pronouncements on product issues. *See, e.g.*, MASS. REGS. CODE tit. 940, § 3.08(2) (stating generally that it is unfair to breach a warranty).

332 *See, e.g.*, N.J. ADMIN. CODE tit. 45, § 13:45A-3.1 (2000). New Jersey’s regulations focus on labeling standards, but also contain product standards, including that meat sold in New Jersey may not exceed 30% fat. *See id.*

333 *See* N.J. ADMIN. CODE tit. 45, § 13:45A-12. New Jersey has comprehensive regulations governing the sale of pets. Most relevant to the product characteristic inquiry is the regulation that defines dogs and cats “unfit for purchase” if they suffer any “disease, deformity, injury, physical condition, illness or defect which is congenital or hereditary and severely affects the health of the animal.” N.J. ADMIN. CODE tit. 45, § 13:45A-12.1. An animal that dies within 14 days of purchase is automatically “unfit,” entitling the consumer to a full refund. *Id.* § 13:45A-12.1 to .2.

334 *See* MD. CODE ANN., COM. LAW §§ 13-308 to -315 (1998) (prohibiting sale of electrical products unless stamped as safe by a certified laboratory and attic fans without a “firestat or fusible line”).

335 *See, e.g.*, N.J. ADMIN. CODE tit. 45, §§ 45A-12.1, 45A-3.10. In addition, defective handgun regulations, while not yet fully implemented, have been promulgated in Massachusetts. *See* MASS. REGS. CODE tit. 940, § 16.00-.09; *American Shooting Sports Council v. Attorney Gen.*, No. 98-0203C (Ct., Jan. 13, 1998). For a more detailed discussion of *American Shooting*, *see infra* Conclusion.

336 *See* *Pet Dealers Ass’n v. Division of Consumer Affairs*, 373 A.2d 688, 689-90 (N.J. Super. Ct. App. Div. 1977).

Conclusion

The inevitable progression of UDAP regulatory authority, from pure disclosure issues, to guidance on minimum quality of services, to occasional forays into product oversight as part of other overarching regulatory structures, has placed many attorneys general on the brink of straightforward product regulation. One leading state in the UDAP arena, Massachusetts, has already taken a bold step in this direction.

In Massachusetts's *Regulations on Handgun Sales*, which addresses "unfair and deceptive practices" engaged in by commercial "handgun purveyors," a significant portion of the overarching regulatory structure addresses minimum product standards.³³⁷ While many of the provisions in this set of UDAP regulations are directed towards informational issues and matters of sales techniques³³⁸ and some of the product standard provisions simply mirror the Massachusetts criminal code,³³⁹ the regulations also include a variety of product design criteria that set independent standards for product safety.³⁴⁰

The handgun industry challenged these regulations on a variety of grounds³⁴¹ and successfully obtained a lower court injunction against the portions of the regulations that set product standards. However, that injunction was vacated by the Massachusetts Supreme Judicial Court,³⁴² and on remand the trial court declared the regulations valid earlier this year.³⁴³ The Supreme Judicial Court's decision specifically held that the

337 MASS. REGS. CODE tit. 940, § 16.00-.09 (1999).

338 See, e.g., MASS. REGS. CODE tit. 940, § 16.06 (requiring warnings, informational disclosures, and explanations regarding handguns offered for sale).

339 Compare MASS. REGS. CODE tit. 940, § 16.03 (stating that it is an unfair practice to sell handguns without tamper resistant serial numbers in certain circumstances), with MASS. GEN. LAWS ANN. ch. 269, § 11E (stating that it is a criminal violation to make such sales). Other provisions of the regulations also parallel state criminal strictures. See, e.g., MASS. REGS. CODE tit. 940, § 16.04 (stating that it is an unfair practice to sell handguns that fail to meet certain minimum safety and quality standards). Interestingly, though, versions of these regulatory sections preceded many of their criminal counterparts. Compare Mass. Reg. 99 (Oct. 31, 1997) (promulgating regulations of handgun sales), with 1998 Mass. Acts 180 (enacting similar criminal provisions in 1998).

340 See, e.g., MASS. REGS. CODE tit. 940, § 16.05(3) (stating that it is an unfair practice to sell handguns without a load indicator or magazine safety disconnect in certain circumstances); *id.* § 16.05(2) (stating that it is an unfair practice to sell handguns without built-in childproofing devices).

341 Industry lawyers raised due process, interstate commerce, and other claims, including claims that the regulatory standards were unreasonable, and that the attorney general lacked authority to promulgate substantive standards. See Complaint, American Shooting Sports Council, Inc. v. Attorney Gen., No. 98-0203, at ¶¶ 33-50.

342 See *American Shooting Sports Council, Inc. v. Attorney Gen.*, 711 N.E.2d 899 (Mass. 1999). The authors successfully defended the regulations before the Massachusetts Supreme Judicial Court in this case.

343 See *American Shooting Sports Council, Inc. v. Attorney Gen.*, Superior Court decision, (Jan. 20, 2000). The trial court decision upheld all of the Massachusetts regulatory standards for new handguns. However, the court also held that certain used gun standards could not be implemented because a statute enacted after the regulations were promulgated pre-empted oversight of those specific weapons.

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Massachusetts Attorney General had authority under the UDAP statute to issue product standards in non-preempted product categories.³⁴⁴ Thus, the UDAP case law now includes the first unequivocal decision by a higher court on this matter. The issue of authority has now been addressed.

In the aftermath of the Massachusetts handgun regulation litigation, states will no doubt begin to apply UDAP regulatory powers to address product safety issues. Given the Massachusetts Supreme Judicial Court's validation of the UDAP regulatory approach, it seems reasonable to assume that emboldened attorneys general will take the example in hand and issue free-standing product safety standards using their UDAP powers.³⁴⁵ The pressing need to find a solution to the current product safety crisis ensures that others will follow the Massachusetts lead. An attorney general, using existing UDAP tools at his disposal, can and will act to protect consumers by patching the product safety net.

³⁴⁴ See *American Shooting*, 711 N.E.2d at 902-03.

³⁴⁵ A more conservative approach would be to include certain select product standards as part of an overarching regulatory framework. Such standards, to the extent they are necessary to implement of a broader disclosure or sales technique-related regulatory regime, are defensible as incidental to the larger regulatory purpose. Technically, the Massachusetts provisions are free-standing product safety requirements. See MASS. REGS. CODE tit. 940, § 16.08 (1999) (noting the severability of each provision in the handgun sales regulations). However, they are in practice part of an overarching structure also concerned with disclosures, otherwise unlawful behavior, and marketing practices in the handgun industry.

